UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

PROPPANT SPECIALISTS, LLC

and **Case 30-CA-082116**

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, AFL-CIO

MOTION FOR SUMMARY JUDGMENT

Andrew S. Gollin, Counsel for the Acting General Counsel, pursuant to Sections 102.24 and 102.50 of the National Labor Relation Board's ("Board") Rules and Regulations, moves for summary judgment in this proceeding on the grounds that there are no genuine issues of material fact framed by the pleadings and that the Acting General Counsel is entitled to judgment as a matter of law. In support of said Motion, Counsel for the Acting General Counsel submits the following:

1. On April 28, 2011, the International Union of Operating Engineers, Local 139, AFL-CIO ("Union") filed a petition under Section 9(c) of the National Labor Relations Act ("Act"), in Case 30-RC-6783, seeking certification as the collective-bargaining representative of certain employees of Proppant Specialists, LLC, ("Respondent"). A copy of the Petition is attached as **Exhibit A**.

2. On May 9, 2011, the Regional Director approved a Stipulated Election Agreement entered into by Respondent and the Union for an election to be conducted on June 9, 2011.

3. On June 9, 2011, an election was held and the results showed that out of the 19 eligible voters, eight (8) cast ballots for, and seven (7) cast ballots against the Union. There were

four challenged ballots, but only three were at issue. On June 16, 2011, Respondent filed timely objections relating to the election.

4. On August 30 through September 1, 2011, there was a hearing regarding the challenged ballots and the objections where all parties were afforded a full opportunity to appear, to introduce relevant evidence, and to examine and cross-examine witnesses. Both parties later filed post-hearing briefs.

5. On November 3, 2011, a Hearing Officer's Report on Challenged Ballots and Objections to Conduct Affecting the Results of the Election With Findings and Recommendations issued, a copy of which is attached as **Exhibit B**.

6. On April 3, 2012, the National Labor Relations Board ("Board") issued a Decision and Direction adopting the Hearing Officer's Findings and Recommendations, a copy of which is attached as **Exhibit C**.

7. On April 9, 2012, following the Board's Decision and Direction, the relevant ballots were counted, and the final tally of ballots showed 9 votes for and 8 votes against the Union.

8. On April 19, 2012, the Acting Regional Director issued a Certification of Representative, attached as **Exhibit D**, identifying the Union as the exclsuive collective-bargaining representative of the following appropriate unit [hereinafter "Unit"]:

> All full-time and regular part-time equipment operators, lab techs, and mechanics employed by the [Respondent] at its Tomah, Wisconsin facility; excluding all managerial employees, office clericals, guards and supervisors defined in the Act.

9. Beginning on April 25, 2012, and on dates thereafter, the Union has requested that Respondent bargain collectively with the Union as the exclusive bargaining representative of the

Unit. Copies of the Union's letters requesting bargaining are attached to the Complaint as **Exhibits E (1)(a)-(c).**

10. On April 25, 2012, and on dates thereafter, the Union also sent letters to Respondent requesting the names, addresses, and telephone numbers of all employees in the Unit. Copies of the Union's April 25, 2012 letter requesting information are attached to the Complaint as **Exhibits E (3)(a)-(c).**

11. On May 29, 2012, Respondent sent the Union a letter declining the Union's request for bargaining. A copy of this letter is attached to the Complaint as **Exhibit E (2).**

12. On May 31, 2012, the Union filed a charge in Case 30-CA-082116, a copy of which is attached as **Exhibit F**. The charge alleges that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union and by refusing to provide the Union with requested information that is relevant and necessary to bargaining.

13. Following investigation of the charge referred to above in paragraph 12, on June 26, 2012, the Regional Director issued a Complaint. A copy of the Complaint is attached as **Exhibit E**.

14. A copy of the June 26, 2012 Complaint was served upon Respondent by certified mail as reflected in the Affidavit of Service and Return Receipt, copies of which are attached as **Exhibits G (1) and (2)**, respectively.

15. On July 9, 2012, Respondent filed an Answer to the Complaint described above in paragraph 13. A copy of Respondent's Answer to Complaint is attached as **Exhibit H**. The Answer, in substantial part, admits the factual allegations of the Complaint. To the extent Respondent disputes any of the Complaint allegations, the disputes are based on Respondent's challenge to the certification of the Union as bargaining representative. Acting General Counsel

asserts that Respondent's correspondence with the Union, and the Answer, demonstrate that Respondent is reasserting claims already rejected by the Board, in an attempt to test the certification of the Union.

16. The defenses raised by Respondent are all matters previously considered by the Board. General Counsel asserts that Respondent's refusal to recognize and bargain collectively and in good faith with the Union is a further impairment of the rights of the properly certified Union and the bargaining unit employees.

17. Where, as here, a party has refused to meet and bargain following certification by the Board, it is not the policy of the Board to allow that party to relitigate in a complaint proceeding an issue or issues which that party has already litigated or could have litigated in a prior representation proceeding. It is well settled that in the absence of newly-discovered and previously unavailable evidence or special circumstances, a respondent in an unfair labor practice proceeding alleging a violation of Section 8(a)(5) of the Act is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. *Pittsburgh Plate Glass Co. v. NLRB,* 313 U. S. 146, 162 (1941); *Guardian Medical Services, Inc.,* 239 NLRB 1264 (1979); *Duke University,* 311 NLRB 182 (1993), enfd. 43 F.3d 712 (D.C. Cir. 1994); and Section 102.67(f) of the Board's Rules and Regulations, Series 8, as amended. In its answer, Respondent has not asserted, nor can it assert, the existence of any special circumstances or newly-discovered, relevant evidence with respect to the issues it raises. Rather, these are all previously litigated matters that the Board fully addressed and decided in the underlying representation proceeding.

18. Under Section 8(a)(5) of the Act, an employer's obligation to bargain in good faith includes a general duty to provide information that is relevant and necessary to the

bargaining representative for contract negotiations or contract administration. *A-1 Door & Building Solutions*, 356 NLRB No. 76, slip op. at 2 (2011); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 152-153 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). Employee personnel information, such as names, telephone numbers, job descriptions, pay-related data, employee benefits, and policies that relate thereto are all presumptively relevant. *Watkins Contracting, Inc.*, 335 NLRB 222, 224 (2001). Presumptively relevant information must be furnished on request to employees' collective-bargaining representatives unless the employer establishes legitimate affirmative defenses to the production of the information. *Ralphs Grocery, Co.*, 352 NLRB 128, 134 (2008), reaffirmed and incorporated by reference, 355 NLRB No. 210 (2010); *Disneyland Park*, 350 NLRB 1256, 1257 (2007). The Union's information request, referred to above in paragraph 10, seeks information that is presumptively relevant and necessary to the Union in its role as the exclusive collective bargaining representative of the unit employees, and Respondent has not raised any legitimate reason for failing to provide that information requested.

19. Based upon the foregoing, it is clear that the pleadings and exhibits in the instant case show there are no material issues of fact not admitted, previously determined or controverted; that no hearing is necessary in this matter; and that it is appropriate for the Board to issue a Decision and Order without further proceedings.

20. Accordingly, it is respectfully requested that the Board transfer and continue this proceeding before it, and give notice to Respondent to show cause why General Counsel's Motion for Summary Judgment should not be granted. General Counsel further requests that upon return of the Notice to Show Cause, the Board grant the instant Motion for Summary Judgment; make findings of fact based upon the allegations of said Complaint, and conclude that,

as a matter of law, Respondent has violated Sections 8(a)(1) and (5) of the Act as alleged in the Complaint; and order an appropriate remedy therefore, including an order that Respondent post a Notice advising employees it has violated the Act; that Respondent recognize, and bargain with, the Union, including providing the Union with previously requested information; and that the initial certification year shall be deemed to begin on the date Respondent commences to bargain in good faith with the Union as the certified bargaining representative of employees in the appropriate unit. *General Electric Company,* 163 NLRB 198 (1967).

Signed at Milwaukee, Wisconsin on July 11, 2012.

Andrew S. Gollin
Counsel for the Acting General Counsel
National Labor Relations Board
Thirtieth Region
310 West Wisconsin Avenue, Suite 700W
Milwaukee, Wisconsin 53203

FORM NLRB-502W (6-96)

FORM EXEMPT UNDER 44 U.S.C. 3512

UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

PETITION

DO NOT WRITE IN THIS SPACE	
Case No. 30-RC-6783	Date Filed April 28, 2011

INSTRUCTIONS: Submit an original and 4 copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located. If more space is required for any one item, attach additional sheets, numbering them accordingly.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

1. **PURPOSE OF THIS PETITION** *(If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.)* **(Check One)**

- ☒ **RC-CERTIFICATION OF REPRESENTATIVE** - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- ☐ **RM-REPRESENTATION (EMPLOYER PETITION)** - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- ☐ **RD-DECERTIFICATION (REMOVAL OF REPRESENTATIVE)** - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.
- ☐ **UD-WITHDRAWAL OF UNION SHOP AUTHORITY (REMOVAL OF OBLIGATION TO PAY DUES)** - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- ☐ **UC-UNIT CLARIFICATION** - A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees: (Check one) ☐ In unit not previously certified. ☐ In unit previously certified in Case No.
- ☐ **AC-AMENDMENT OF CERTIFICATION** - Petitioner seeks amendment of certification issued in Case No. ___ Attach statement describing the specific amendment sought.

2. Name of Employer:	Employer Representative to contact	Telephone No.
Proppant Specialists, LLC	Brandon Crawford	608-374-4942
3. Address(es) of Establishment involved (Street and number City, State ZIP Code): 12451 Franklin Rd., Tomah, WI 54660		Fax No.
4a. Type of Establishment (Factory, mine, wholesaler, etc.) Material Production	4b. Identify principal product or services: Sand and gravel	

5. Unit involved (In UC petition, describe present bargaining unit and attach description of proposed clarification)

Included: All full-time and regular part-time equipment operators, lab techs, and mechanics employed by the Employer at its facility known as the Oakdale Wash Plant located at 12451 Franklin Rd., Tomah, WI 54660.

Excluded: Any and all licensed over-the-road dump truck drivers, office and clerical employees, guards/supervisors as defined by the Act.

(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)

6a. Number of Employees in Unit: approximately 20

Present 9 *(By UC/AC)*

6b. Is this petition supported by 30% or more of the employees in the unit?* ☒ Yes ☐ No

*Not applicable in RM, UC, and AC

7a. ☐ Request for recognition as Bargaining Representative was made on (Date) N/A (If no reply received, so state.)

7b. ☐ Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8. Name of Recognized or Certified Bargaining Agent *(If none, so state.)* None	Affiliation N/A
Address, Telephone No. and Telecopier No. (Fax) N/A	Date of Recognition or Certification N/A
9. Expiration Date of Current Contract, If any. *(Month, Day, Year)* N/A	10. If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop. *(Month, Day, Year)*
11a. Is there now a strike or picketing at the Employer's establishment(s) involved? Yes ☐ No ☒	11b. If so, approximately how many employees are participating? N/A

11c. The Employer has been picketed by or on behalf of *(Insert Name)* _____ a labor organization, of *(Insert Address)* _____ Since *(Month, Day, Year)* _____ N/A

12. Organizations or individuals other than Petitioner (and other than those named in items 8 and 11c), which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5, above. *(If none, so state.)* None

Name	Affiliation	Address	Date of Claim
None			Telecopier No. (Fax)

13. Full name of party filing petition (If labor organization, give full name, including local name and number) International Union of Operating Engineers, Local 139, AFL-CIO.

14a. Address *street and number, city, state, ZIP code)* N27W23233 Roundy Drive, Pewaukee, WI 53072	14b. Telephone No. 262-896-0139
	14c. Telecopier No. 262-896-0758

15. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when petition is filed by a labor organization).* International Union of Operating Engineers, AFL-CIO.

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name *(Print)* Pasquale A. Fioretto	Signature Pasquale A. Fioretto	Title *(If any)* Attorney
Address *(street and number, city, state, and ZIP code)*		Telephone No. 312/236-4316
Baum Sigman Auerbach & Neuman, Ltd. 200 W. Adams Street, Suite 2200, Chicago, IL 60606		Telecopier No. (Fax) 312/236-0241

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

PROPPANT SPECIALISTS, LLC

Employer

Case 30-RC-6783

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, AFL-CIO

Petitioner

HEARING OFFICER'S REPORT ON CHALLENGED BALLOTS AND OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION WITH FINDINGS AND RECOMMENDATIONS

INTRODUCTION

Pursuant to a petition filed on April 28, 2011, and in accordance with the Stipulated Election Agreement approved by the Regional Director on May 9, 2011, an election was conducted on June 9, 2011 among employees in the following unit:

> All full-time and regular part-time equipment operators, lab techs, and mechanics employed by the Employer at its Tomah, Wisconsin facility; excluding all managerial employees, office clericals, guards, and supervisors as defined in the Act.

The results of the election, as set forth in the tally of ballots, show that of approximately 19 eligible voters, 8 cast ballots for, and 7 cast ballots against the Petitioner. There were four challenged ballots, but only three are at issue.[1] On June 16, 2011, the Employer filed timely

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[1] The four challenged ballots are for: Barrett Oliver, Todd Rainey, Ralea Rainey, and Burdette ("Bart") Billings. On August 17, 2011, the Regional Director issued a Notice of Hearing on Employer's Objections to Conduct Affecting the Results of the Election and Challenged Ballots, which contains a footnote regarding the challenged ballot of Billings. The footnote states the Board Agent conducting the election challenged the ballot of Billings because his name was not listed on the *Excelsior* list provided to the Region by the Employer in advance of the election. On May 18, 2011, Billings filed an unfair labor practice charge against the Employer in Case 30-CA-18986, alleging that he was discriminatorily

EXHIBIT B

objections. There was a hearing on the challenged ballots and objections in Tomah, Wisconsin from August 30 through September 1, 2011. All parties were afforded a full opportunity to appear at the hearing, to introduce relevant evidence, and to examine and cross-examine witnesses. Both parties filed post-hearing briefs, which I have carefully considered.

The three challenged ballots at issue concern Todd Rainey, Ralea Rainey, and Barrett Oliver.[2] The Petitioner challenged the ballot of Todd Rainey, contending he is a supervisor within the meaning of Section 2(11) of the Act. The Employer challenged the ballot of Barrett Oliver, claiming he is a supervisor within the meaning of Section 2(11) of the Act. The Petitioner challenged the ballot of Ralea Rainey, contending she is an office clerical employee, and, therefore, excluded from the stipulated unit.[3]

In addition to the challenged ballots, there are three objections. First, the Employer contends that Barrett Oliver, as a statutory supervisor, coerced eligible voters into supporting Petitioner and/or interfered with eligible voters' freedom of choice by: (1) making and posting repeated statements in support of the Petitioner; (2) telling, and posting literature which stated to employees that they needed a union and promising employees benefits if they voted for the

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terminated because of his union and/or protected concerted activities. In its position statement dated June 22, 2011, Petitioner stated that if the Region dismisses Billings' (mistakenly referred to as Harold Burdett) charge, his ballot should not be counted. Billings filed a contemporaneous charge with the Mine Safety and Health Administration (MSHA) alleging discriminatory termination. On July 20, 2011, based on her conclusion that Billings' charge was not frivolously brought, the Solicitor of Labor filed a petition for temporary reinstatement of Billings with the Federal Mine Safety and Health Review Commission Office of Administrative Law Judges. In light of this action, the Regional Director decided to hold Billings' unfair labor practice charge against the Employer in abeyance and directed the undersigned not to consider evidence on the subject of Billings' challenged ballot. As a result, the parties did not present, and the undersigned will not make findings, conclusions, or recommendations, regarding Billings' challenged ballot.

[2] Todd Rainey and Ralea Rainey are husband and wife.

[3] Initially, the Petitioner also argued that Ralea Rainey is excluded as both an office clerical and as a professional employee. However, at the hearing, the Petitioner withdrew its assertion that Ms. Rainey is a professional employee, and stated that its sole basis for challenging her ballot is that she is an office clerical.

union; (3) predicting that he and the union would be "running this place" as soon as the union won the election; (4) acting as an observer for the Petitioner at the election; (5) using his position to threaten voters' job security; and (6) engaging in other coercive conduct and conduct that tended to interfere with employees' ability to exercise a free and reasoned choice in the election. Second, the Employer contends that Petitioner coerced eligible voters and otherwise destroyed the "laboratory conditions" necessary for a fair election by electioneering in the voting area by having a statutory supervisor, Oliver, wear insignia of Petitioner while acting as the Petitioner's election observer. Third, the Employer contends that Petitioner coerced eligible voters and otherwise destroyed the "laboratory conditions" necessary for a fair election by, during the voting period, electioneering in the voting area and creating the impression of surveillance in the voting area by displaying large yard signs supporting Petitioner at a private residence directly across the street from the polling place.[4]

For the reasons set forth below, I recommend that the challenge to Ralea Rainey be sustained, and the challenges to Todd Rainey and Barrett Oliver be overruled. I find the Petitioner has met its burden of establishing that Ralea Rainey is an office clerical and, therefore, excluded from the unit. I, however, do not find that the Petitioner has met its burden of establishing that Todd Rainey is a Section 2(11) supervisor. Similarly, I find the Employer has

[4] In a footnote in the Notice of Hearing on Employer's Objections to Conduct Affecting the Results of the Election and Challenged Ballots, the Regional Director commented that the Employer, in its position statement dated June 22, 2011, asserts, seemingly with respect to its third objection, that agents of Petitioner created the impression of surveillance by "milling about" between the 24-hour speech and the election. The Petitioner contends that, because the Employer did not raise this allegation in its objections, the objection has been waived, and it should not be considered by the undersigned. The Regional Director stated that the undersigned was permitted to receive and consider this evidence only to the extent it pertains to the allegations in this final objection.

not met its burden of establishing that Barrett Oliver is a Section 2(11) supervisor. I, therefore, recommend that the ballots of Oliver and Todd Rainey be opened and counted.

As for the objections, the Employer's sole basis for its first and second objections is that Oliver is a statutory supervisor, thereby making his alleged conduct objectionable. In concluding that the Employer has failed to meet its burden of proving that Oliver is a statutory supervisor, I recommend dismissing those first two objections as having no merit. As for the third objection, alleging that the Petitioner engaged in electioneering and created the impression of surveillance in the voting area by displaying large yard signs supporting Petitioner at a private residence directly across the street from the polling place, I find the evidence presented does not establish that the claimed conduct was objectionable. I, therefore, recommend overruling each of the objections.

FACTUAL BACKGROUND

Overview

The Employer, Proppant Specialists, LLC, which has its corporate headquarters in Brady, Texas, operates a sand refining facility in Oakdale, Wisconsin. The Oakdale facility consists of four separate buildings spread out over several acres of land. The buildings include a Wet Plant, a Dry Plant, a Shop Area, and the Office. The Employer brings sand in from local bogs and stores it onsite in large piles outdoors. The process begins when the sand is transported by front-end loaders from the piles to the Wet Plant. The Wet Plant is an outdoor building which cleans and separates the sand by grade. The process begins with the loaders dumping the sand into a hopper that feeds the sand into a hydrosizer. The hydrosizer is a square vessel with rising water current that separates the light sand from the coarse sand. After the sand comes out of the hydrosizer, it is cleaned with an attrition scrubber that removes any remaining clay from the sand.

The sand is then run up a screw classifier (i.e., a large auger), removing any residual water. The sand then goes up on a conveyor belt and out of the Wet Plant onto large piles. The Employer typically runs 150 to 170 tons of sand through the Wet Plant per hour, or around 3,000 to 4,000 tons a day. The Wet Plant first became operational in November 2008.

The Dry Plant is a four-story building several hundred feet from the Wet Plant. The Employer constructed the Dry Plant in the Winter of 2010. The Dry Plant became operational in around February 2011. The sand that has gone through the Wet Plant is transported over to the Dry Plant and is placed into a feed hopper, which dumps the sand onto a belt that goes to a large rotary dryer. The sand is put into one end of the dryer, which has a burner at the other end, fuel is injected, and the machine dries the sand. The dryer produces approximately one hundred tons of dried sand per hour. After the drying process is completed, the sand is moved on conveyer belt up an elevator to two large filter screens where the sand is separated into three different products: a coarse grade, a middle grade, and a fine grade. The sand is then moved and stored in one of six large storage silos. Each storage silo can hold 200 tons of sand. The sand remains in the silos until it is loaded into trucks for delivery.

Next to the Dry Plant is a laboratory. Throughout the process, samples are taken and tested, and paperwork is prepared regarding the sand, in the laboratory. There are various testing devices, computers, printers, etc. in the laboratory.

Separate from the Dry Plant is the Office, which is a three-level building. The Office is an old farmhouse that the Employer had renovated.

The Employer employs Loader Operators, Operators and Utility Persons in both its Wet Plant and its Dry Plant, and Technician/Loadout Persons in its laboratory. The Employer also has at least one Maintenance Mechanic who works out of the Shop Area. The Loader Operators

are responsible for transporting the sand, using large Caterpiller front-end bucket loaders. They transport the sand between the piles, the Wet Plant, and the Dry Plant. The Operators in the Wet Plant and in the Dry Plant are responsible for running and monitoring the machines in their respective Plant, as well as cleaning and maintaining the equipment and work areas. The Utility Persons are responsible for assisting the Operators in their duties. The Laboratory Technicians/Loadout Persons are responsible for taking and testing sand samples and documenting the test results, loading the trucks with sand from the silos, weighing the trucks, and completing related paperwork. The Maintenance Mechanic is responsible for the upkeep and overall operation of the machines and equipment throughout the facility.

The Employer operates its facility twenty-four hours a day, seven days a week. The Employer operates two twelve-hour shifts. The AM-PM or Day Shift runs from 6:00 a.m. to 6:00 p.m. The PM-AM or Night Shift runs from 6:00 p.m. to 6:00 a.m. The staffing levels vary, but according to the work schedules, the Employer typically will have one Loader Operator, one Operator, and one Utility Person for each Plant, two lab technician/loadout employees, and one Maintenance Mechanic scheduled for the AM-PM Shift. The Employer typically will have one Loader Operator, one Operator, and one Utility Person for each Plant, along with one laboratory technician/loadout employee scheduled for the AM-PM Shift. The Maintenance Mechanic is on-call at all times.

The monthly schedules list which employees are working on what shift, in what building, and at what position. The schedules also identify a "Production Supervisor" for each shift. During the critical period, Todd Rainey was regularly listed as the AM-PM Production Supervisor, and Barrett Oliver was regularly listed as the PM-AM Production Supervisor. The record reflects that since the facility opened, there have been several managers. Wayne Dailey

currently is the Acting Plant Manager, and he has held that position since April 2011. Prior to him, John Rice and Brandon Crawford each spent time managing the facility. There are other corporate managers, such as Dae Locklear, who also have worked at the Oakdale facility. Since mid-April 2011, Ralea Rainey has been working in the Office with Wayne Dailey, performing various clerical functions. She replaced Bethany McClain, whose employment ended at the end of April 2011.

Barrett Oliver

Barrett Oliver began working for the Employer in April 2010. He began working as an Operator and as a Loader in the Wet Plant, on the PM-AM Shift. For the first several months of his employment, Oliver worked with Jeff Sobczak, another operator. There was no manager or supervisor that worked with Oliver or Sobczak on the PM-AM Shift. Oliver testified that he and Sobczak knew their jobs and what work they had to complete during their shifts. If there was anything extra that they needed to do, Oliver testified that whoever was the Plant Manager would give them those orders at the start of their shift. Oliver testified that if he or Sobczak had any issues, they would contact whoever was the Plant Manager at the time.

Oliver earned $14 per hour when he first began working for the Employer. Toward the end of 2010 and into early 2011, the Employer began to hire additional employees. On January 7, 2011, the then Plant Manager, John Rice, met with Oliver, Sobczak, and another employee to inform them they each would be receiving a $1 per hour raise. Rice told them they were getting the raise because they were doing a good job, and because the new people being hired were going to be receiving $15 an hour. At the time of the increase, Rice completed a Change of Status Form for Oliver. In the comment section, Rice wrote that Oliver "has stepped up to the plate. He has taken the initiative to run the Night shift [and] has earned this raise." Oliver testified that

Rice never explained to him what he meant by this comment. On January 28, 2011, Rice promoted Oliver and two others to Crew Leaders. Oliver received another $1 per hour raise, increasing his wage to $16 per hour. Rice explained to Oliver and the other two that their responsibilities as Crew Leaders were to "make sure that ... everything kept moving, just keep checking up on stuff, keep things right going with everybody else." Oliver never received a Job Description regarding what his duties and responsibilities were as a Crew Leader, and Oliver never received a performance evaluation or review after he became a Crew Leader. At the time of the promotion, Rice completed a Change Status Form. In the comment section on the form, Rice wrote Oliver "has done a fantastic job of steping (sic) up to the plate and learning & earning his promotion to status as crew lead for Night Shift." According to Oliver, Rice never explained what he meant by this comment. Oliver remained as a Crew Leader on the PM-AM Shift until late June 2011, after the election, when Oliver asked Wayne Dailey if he could move to the AM-PM Shift. Dailey agreed and Oliver has worked the AM-PM Shift ever since.[5]

At no time did Oliver receive a company cell phone or a company email address. At or around the time he began working for the Employer, Oliver did receive a set of keys to the facility. Oliver used the keys to unlock doors for other employees. At some point, the Employer changed the locks and Oliver was not given a new set of keys.

According to the Acting Plant Manager, Wayne Dailey, prior to and during the critical period, he had designated Oliver to be the person in charge on the PM-AM Shift. There is no contention that Oliver ever had the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees, or adjust their grievances, or to effectively

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[5] At all material times prior to and during the critical period, Oliver worked the PM-AM Shift. Following the election, Oliver moved to the AM-PM Shift. The analysis regarding Oliver is limited to the time prior to the election.

recommend any of these actions. Dailey stated that Oliver's responsibility on the PM-AM Shift was to "keep the operations running." Dailey stated that if the plant had to be shut down and nobody needed to be there, Oliver could let the people go, or if some piece of equipment was broken and a mechanic was needed, Oliver could call in the mechanic to fix the piece of equipment. The record, however, reflects only one specific instance in which Oliver shut down the facility and sent employees home. It occurred when the conveyor belt in one of the Plants snapped. Oliver testified that he called and received approval from Todd Rainey to shut down the facility and send employees home. There are no other specific instances in the record in which Oliver was alleged to have been involved in shutting down the facility or sending employees home.

Harold Burdett, the Maintenance Mechanic for the Oakdale facility, testified about his interactions with Oliver. Burdett is the only mechanic/welder/electrician working for the Employer at the facility, and he is responsible for dealing with most mechanical or electrical issues that arise. Burdett testified that when he met Oliver he was introduced as being the Night Supervisor. Burdett works the AM-PM Shift, so he seldom actually saw Oliver work prior to or during the critical period. Burdett, however, did testify that there were instances ("probably a dozen") when Oliver called him at home to report an issue at the facility (e.g., bearings had broken and needed to be replaced). Burdett acknowledged that he was always on-call, and that it was his responsibility to handle these issues when they arose at the facility. Burdett also reported that other employees have called him to make similar reports, and Burdett assumed, but did not know, that this occurred when Oliver was not working. Burdett testified that when he received these calls from Oliver or the other employees, he would go the facility and address the problem. Burdett did not provide any specifics regarding these instances. He testified that when he arrived

at the facility, Oliver or whoever called him typically would meet him and explain the problem, and he (Burdett) would take it from there.

Rebecca Campobello, the lead laboratory technician/loadout person, testified about her interactions with Oliver. Campobello works the AM-PM Shift. She testified that from January through early April 2011, during the shift change at around 5:45 p.m. and again at 5:45 a.m., employees would gather in the control room in the Dry Plant for about 15 minutes. At this time, there were informal discussions about what work had been completed and what work still needed to be done. Campobello testified that during the evening shift change, Oliver would be present and he would make assignments to the employees working on the PM-AM shift. Campobello testified as follows in response to questioning by the Employer:

> Q: Did it ever come up in terms of what he was going to do, during that 10 or 15 minutes that you were there, you never noticed or you never heard him say what he was planning on doing during the night shift?
> A: No, as God is my witness, no. He would tell everybody what to do, and then we would be kind of talking and we'd just kind of go home or whatever. And he was, at that time, telling people, directing them, what they needed to do. "Bart, you need to run the loader tonight." "John, you are going up to the wet plant" or --
> Q: And that was based on what -- you said there was a list?
> A: Not necessarily always a list. I mean, the day shift, if they would run over, and they were scheduled to do something during the day shift, and it wasn't all taken care of, it would go down over to the night shift, and they'd say "Hey, Barrett, this is what I need your guys to do tonight."
> Q: And did you ever see that list?
> ...
> A: I didn't go right up and look exactly at it, it was always laying up on by the controls.
> Q: Do you know who prepared that list?
> ...
> THE WITNESS: No, I do not. I do not exactly know for positive, no.
> ...
> Q: -- you don't know whether or not that list contained the assignments --
> ...
> A: No, I do not.
> Q: Okay. On those days, when your shifts intersected and Barrett Oliver was not working, who would be in charge of telling the night shift employees what work to do?

A: Pertaining to that list, they'd tend to do their own thing. They'd say, "Well, you want to do this tonight?" "Okay, you do this, I'll go ahead and do that."

Campobello also testified that upon arriving at the start of her shift, she would review the paperwork regarding the laboratory results of the sand from the prior night. Campobello testified that, during April to June, there were "issues" with sand being sent out from the facility that was below the Employer's established standards. Campobello testified that if there was a question about the quality of the product being shipped out, those questions were to come to her. Campobello spoke with Sandy Haskins, one of the laboratory technician/loadout persons who worked the PM-AM Shift, about one particular shipment at issue, and Haskins told Campobello that she "took care of it through my night supervisor, Barrett." There is a two-page document that shows that one load went out of the facility on around April 2, 2011 that was below the Employer's 90% standard (the record shows the load was 88.28%), and that the load was sent "per Barrett." There is no other evidence regarding the circumstances surrounding this situation.

Robert St. Clair, a former operator and loader at the facility, also testified about his interactions with Oliver when he worked the PM-AM Shift in around May 2011. He testified he "received orders" from Oliver, and that Oliver would tell him where or on what equipment he was going to be working that night. St. Clair testified Oliver would tell him, for instance, if he "was going to be on the loader that night, or running the wet plant itself, in the building, and doing the rounds on all the machinery." St. Clair testified he received these "orders" from Oliver in the Wet Plant. St. Clair testified he always worked in the Wet Plant.

St. Clair testified that when he worked the PM-AM Shift, there was not a schedule with each employee's assignment on it. However, according to the evidence, there was a written schedule with assignments on it that Todd Rainey prepared, and those schedules began in late

April 2011. The schedule for May 2011 lists who was scheduled to work each day and whether they were going to be working in the Wet Plant or the Dry Plant, and whether they were going to be working as Loader, Operator, Utility, or Maintenance. St. Clair's name is listed throughout the May 2011 schedule, including his shift, where he was working, and what particular job he was going to be performing.

St. Clair also testified about instances in which Oliver reassigned him during his shift to perform some other task:

> HEARING OFFICER GOLLIN: Did anyone – well, first of all, who would tell you that you would be doing something else than what was on the schedule?
> THE WITNESS: Normally the supervisor.
> HEARING OFFICER GOLLIN: Specifically who do you recall – when that occurred who do you specifically telling you?
> THE WITNESS: Well usually it was Barrett.
> HEARING OFFICER GOLLIN: Okay.
> ...
> HEARING OFFICER GOLLIN: Okay. And as far as – and your specific recollection is is that you would be asked to fix something and that would be an instance in which you would be taken off of what you would otherwise be listed on the schedule as doing, correct?
> THE WITNESS: Yes.
> HEARING OFFICER GOLLIN: What I'm trying to understand, were you the only person available who could do that job?
> THE WITNESS: Usually we worked in teams.
> HEARING OFFICER GOLLIN: Okay.
> THE WITNESS: So if there was be a belt there would be – if there was two or three of us at the wet plant that night, we'd all work together because we couldn't put sand in the hopper because the belt was already broken. It couldn't disperse the sand.
> HEARING OFFICER GOLLIN: Okay.
> THE WITNESS: So we all had to work on it to get it working again.
> HEARING OFFICER GOLLIN: So you're saying that when you would be – let's use the term -- reassigned to another task, it would mean you and everyone else that was working in that area would be reassigned to fix the item because you work in teams.
> THE WITNESS: Normally, yes.
> HEARING OFFICER GOLLIN: Okay, and that's because you wouldn't be able to do your job. If the belt isn't fixed there's nothing going on the conveyor or in the machine, so in order to do your job you would have to be – you would have to go fix, replace, whatever.

THE WITNESS: Yes.
HEARING OFFICER GOLLIN: All right, do you recall other instances in which you would be, again I'll use the term reassigned, other than if something was broken?
THE WITNESS: If someone didn't show up for work, they called in sick, or something like that, or possibly if they were tardy and we needed to get rolling.
HEARING OFFICER GOLLIN: And again, I don't want you to guess if you don't know the answer, you don't know the answer, do you know how the decision was made to pick you to go and cover for the person who was not there?
THE WITNESS: I was probably the only other person there, or I might have been the only person that was tasked trained on that piece of equipment. Say the loader, we had new employees and then we had some that were from Manpower, and they couldn't operate machinery so I would have to go on the loader, say, if I was going to be – maybe I was wet plant that night, the operation, but they were sick or whatever, I would jump on the loader because I was the only other person that would be able to run it.
HEARING OFFICER GOLLIN: Okay. Do you recall any other instances in which you'd be reassigned other than something was broken and you had to fix it, or someone didn't show up? Any other instances in which?
THE WITNESS: Umm – now and then – like I said, if I worked with Jeff sometimes he would get in the loader, to give me a break, and I would go in the wet plant and run the sand samples or whatever. Stuff like that.
HEARING OFFICER GOLLIN: How was that decision made?
THE WITNESS: That decision would be made between the two of us.
HEARING OFFICER GOLLIN: Okay.
THE WITNESS: As long as the production stayed rolling good that wasn't – that usually wasn't an issue.
HEARING OFFICER GOLLIN: All right. Any other instances that you can think of where you would be reassigned or – other than the three that you've just talked about?
THE WITNESS: Not that I can think of off hand.

Following the above questions, the Employer examined St. Clair regarding Oliver's role in assignments and reassignments:

Q: BY MR. ANDREWS: When you were being assigned by Barrett Oliver to a particular task, was there any discussion that accompanied that or was it just simply go there, go there?
A: We usually knew our job pretty well and usually it was just, run the loader, possibly back haul to the dry plant also, just – we would fill the wet plant, the hopper there, but sometimes we would haul dry sand up to the dry plant and stockpile.
Q: And hauling dry sand to the dry plant, was that a decision you made on your own or did you have to have Barrett Oliver tell you to go do that?

A: Well I had originally been told when I was trained, you know, we did that. That's what we were trained to do. If we had some down time. To haul sand.
Q: Did you have to check with Barrett Oliver to go do that, though?
A: Not usually. He would be out there, you know. Like I said he made his rounds but usually I didn't have to ask to do it.

St. Clair also testified about his observations of Oliver with regards to the Manpower temporary employees working at the facility:

HEARING OFFICER GOLLIN: And, again, if you know, based upon your personal observations, his question is who would give instructions to the Manpower employees?
THE WITNESS: Barrett gave instructions to them just like he did to me.
HEARING OFFICER GOLLIN: And do you know the basis as to how he went about deciding what, if any, instructions to give to these people?
THE WITNESS: Well, the instructions were – like I said, they couldn't operate machinery so normally they would be doing maintenance on the wet plant itself.
HEARING OFFICER GOLLIN: And when you say, maintenance, just so I'm clear because we had that individual before that talked about maintenance and that involved electrical work, and mechanical work, and things of that effect. I'm assuming that's not what you mean. I think maintenance, you mean like maintaining the environment.
THE WITNESS: Maintaining, yeah.
HEARING OFFICER GOLLIN: Like cleaning.
THE WITNESS: Cleaning, you know, running samples, the sand samples. They would have to run them. Run the fire hose. We wash a lot of sand out with the fire hose. Just kind of menial tasks where no one would get hurt.

St. Clair also testified about equipment or production issues during his time on the PM-AM Shift. If something broke, St. Clair would report the problem to Oliver, if he was there. If Oliver was not there, St. Clair would report the problem to the next most senior person on the Shift. However, if the problem created an unsafe situation, St. Clair testified that employees could decide on their own to shut down operations. St. Clair further testified that if the problem did not pose a safety risk but did affect production, the operations would be shut down and the employees would work together to attempt to fix the problem. If the problem could not be fixed, the facility would remain shut down and employees would be sent home. St. Clair recalled there

were instances when he worked on the PM-AM Shift when the facility was shut down, and that Oliver informed employees that the facility would be shut down. St. Clair, however, did not know whether or not Oliver spoke to any superior before shutting down the facility. As far as sending people home, St. Clair testified that there was one time when he worked the PM-AM Shift that employees were sent home because there was no more sand left to be processed. St. Clair could not recall if Oliver spoke to anyone else before sending employees home in this instance, but that it was possible that he did.

Todd Rainey testified about his interactions with Oliver when the two briefly worked together on the PM-AM Shift in the middle of April 2011. Mr. Rainey testified that when he met Oliver, Oliver identified himself as the "nighttime supervisor" and that he (Oliver) was going to be Mr. Rainey's supervisor when he (Mr. Rainey) worked the PM-AM Shift. Mr. Rainey testified that Oliver showed him how he (Oliver) set up the Wet Plant and coordinated the people. Mr. Rainey testified that Oliver would use who he thought was good at a particular spot, and that sometimes he would rotate people around. Mr. Rainey also testified that when he initially took over preparing the schedule, he spoke with Oliver and Oliver told him who, in his opinion, performed best at which job on the PM-AM Shift, and Mr. Rainey decided to use that information when he prepared his first monthly schedule. The record does not reflect whether Mr. Rainey continued to consult with Oliver moving forward when he (Rainey) prepared the monthly work schedule.

Mr. Rainey further testified that he and Oliver spoke on a daily basis during the shift changes. When Oliver was coming in to start the PM-AM Shift, Mr. Rainey would report what work had been completed during the AM-PM Shift, whether there were any issues or problems, and what work needed to be completed during the PM-AM Shift. When Oliver was leaving, and

Mr. Rainey was coming in to start the AM-PM Shift, Oliver would report the same information to Mr. Rainey.

Ethan Kogutkiewicz, a loader operator, testified about his interactions with Oliver when the two worked together on the PM-AM Shift from early April to early May 2011. He testified that when he worked the PM-AM Shift, he (Kogutkiewicz) really did not report to anyone on a daily basis. He said that if the plant he was in was running, he "just went to look at the schedule, see what I'm scheduled to do and just started doing my job." He testified that he viewed Oliver as his supervisor on the PM-AM Shift because he was listed as such on the schedule.

Kogutkiewicz testified that there were times when Oliver would assign or reassign him to different tasks when he worked with him the PM-AM Shift. Kogutkiewicz testified as follows:

> HEARING OFFICER GOLLIN: When you say that Mr. Oliver asked you or instructed you to go on the Genie Lift, I think you previously testified that you were the only person trained to operate the Genie Lift there at the time?
> THE WITNESS: Yes.
> HEARING OFFICER GOLLIN: Okay.
> THE WITNESS: And so he was kind of organizing who could do what, where they should be. That was right after we had hired a couple of new people, so there was only a couple experienced people on the shift at the time.
> HEARING OFFICER GOLLIN: Okay, and I also believe that you testified that he had you on a particular day work on a loader, is that correct? Am I recalling your testimony correctly?
> THE WITNESS: Yes.
> HEARING OFFICER GOLLIN: Or he moved you over to a loader?
> THE WITNESS: Temporarily, for part of the shift. I believe it was Mark at the time was late and called in, said he was going to be late. Barrett then -- I was scheduled to run the burner. Barrett told me to go get in the loader and assigned the dry plant utility worker at the time, whoever that was, to run the burner.
> HEARING OFFICER GOLLIN: Okay.
> THE WITNESS: I don't remember who it was.
> HEARING OFFICER GOLLIN: All right. Was there anyone else available at the time that could have operated the loader that you know of?
> THE WITNESS: Could have -- well, the utility person could have just as easily operated as I or the utility person at the wet plant.
> HEARING OFFICER GOLLIN: Okay.
> Did Mr. Oliver say anything as to why he decided to put you on the loader? I'm sorry -- yes, Mr. Oliver.

THE WITNESS: No, he did not.
HEARING OFFICER GOLLIN: Okay, so you don't know the thought process if he had --
THE WITNESS: Well, I was standing right next to him when he got the call.
HEARING OFFICER GOLLIN: Oh, you mean the call from the individual saying that he was going to be late?
THE WITNESS: Yah, they called the dry plant control room; and, you know, he would usually come in to there at the beginning of the shift. You know, it's kind of where you exchange with the shift and then, you know, talking with another shift. And then they called it might have been right at the beginning of our shift, maybe 5 till or 5 after.
HEARING OFFICER GOLLIN: All right, so as far as you know, Mr. Oliver didn't talk to anyone after receiving the call from the employee who was late to get guidance or any discussions with anyone about who should be operating what equipment?
THE WITNESS: No.
....
HEARING OFFICER GOLLIN: Okay. How often would -- or how often, if ever -- I think you've already testified that there are I think two instances -- how often, if ever, did Mr. Oliver come up to you, you know, and move you from where you were listed on the schedule?
THE WITNESS: I think he only moved my actual position the two times, but there was multiple times where the plant would be down when we came to work because there may be an elevator plugged and some other problems -- rotex, and he would instruct whether who should work on the elevator and who should go up into rotexes and fix screens, you know, instruct who should go where.
HEARING OFFICER GOLLIN: Okay.
And did he ever explain his decision-making process to you as far as why he decided to send whom where?
THE WITNESS: No.
HEARING OFFICER GOLLIN: All right.
Do you know -- and I think only if you know -- do you know whether or not he talked to anyone to decide where to send people?
THE WITNESS: I have absolutely no idea.

Kogutkiewicz further testified as follows about what happened when he worked the PM-AM Shift as an Operator in the Dry Plant:

Q: BY MR. ANDREWS: You testified a little bit ago about the designation "dry plant operator" and then you talked about different tasks that you were assigned within the dry plant.
A: Yes.
Q: Are those different tasks -- let me ask it in this way:
Is "dry plant operator" sort of a catch-all phrase for all the different tasks that are done within the dry plant?

A: I'm going to answer this way: That would depend on how many people are working. If there's a utility, the answer to that question would be "no," and --
Q: Okay.
A: -- the utility does everything besides the dry plant operator would run samples and run the burner. If there's no utility, which is usually on weekends -- if there wouldn't be utility because it's slower than the dry plant operator will do everything. And if he gets behind, then the loader operator will come in and help.
Q: Okay. And would Barrett Oliver give you instruction as to which of the particular tasks you should be performing within the dry plant?
A: I wouldn't say he would really tell me that way. Sometimes he would come in and help if I was in there by myself, and he would say, "Okay, I'll do this, you go do that," as in say I had to run -- "you run samples every two hours." Say I had to get a sample and my overs needed to be taken out, he would go get my samples for me and instruct me to go empty the overs with the skid steer, and then I would come back into the control room afterwards.

Sandra Haskins, a laboratory technician / loadout person, testified about her interactions with Oliver when the two worked together on the PM-AM Shift from February 2011 until mid-June 2011. She testified that when there were issues with the equipment, she would go and assist with the repair efforts. She testified all the employees worked together to repair the equipment, if they could, and that no one would take the lead in assigning employees to perform specific tasks. If Haskins had problems in the laboratory, she testified that she would report those to Barrett Oliver. Haskins acknowledged she was supposed to report problems in the laboratory to Rebecca Campobello, but that she tried not to do that if she could. Haskins did not explain why this was the case.

Haskins also confirmed that she did send out loads of sand that were below the Employer's 90 percent standard. She confirmed that she sought out and received Oliver's permission to do that, and that she did not have the authority to do that on her own. Haskins did not provide any explanation as to why she did this, other than that she viewed Oliver as her supervisor. Haskins confirmed that she did not know if Oliver checked with anyone else before giving Haskins permission to send out a load that was below the Employer's 90 percent standard.

Haskins confirmed that Campobello confronted her about sending out a below standard load, and that Haskins told her that she had checked with Oliver, her night supervisor, and he gave her permission. There is nothing in the record regarding the implications or consequences on the Employer or any of the employees involved for sending out this particular substandard load.

Todd Rainey

Todd Rainey began working for the Employer in March 2011. He was hired by then Plant Manager John Rice. Prior to being hired, Mr. Rainey was a construction contractor hired to assist in the construction or renovation of the Office. Rice later offered Mr. Rainey a job at the facility as a plant operator. At the time, Mr. Rainey had no experience in the sand processing industry. Mr. Rainey testified that he received his on-the-job training from then Crew Leader, Mike Rizzo, who worked with Mr. Rainey on the AM-PM Shift, and from then Crew Leader Barrett Oliver, who worked with Mr. Rainey for about two or three weeks on the PM-AM Shift in April 2011. With the exception of that two-to-three-week period in April 2011, Mr. Rainey worked the AM-PM Shift.

Initially, the Employer paid Mr. Rainey $15.75 per hour. On April 13, 2011, he received a merit increase raising his rate to $16.50 per hour. The Change of Status form, which was completed by John Rice, does not provide any additional explanation or commentary regarding the merit increase. In around April 2011, Mr. Rainey testified that he began receiving training on becoming a Crew Leader, and that his training lasted several months. On August 9, 2011, the Employer gave Mr. Rainey another raise to $18.50 per hour. The Change of Status Form for this increase describes the increase as a pay rate change, and not a merit increase or a promotion. In around August 2011, the Employer gave Todd Rainey a company cell phone and a company email address. He also had access to a company truck that he used while he was at the facility.

Wayne Dailey, the Acting Plant Manager, testified about Mr. Rainey's role. According to Dailey, Mr. Rainey oversees the other employees and makes sure they get their jobs done. As far as discipline, Dailey stated that Mr. Rainey brings disciplinary issues to him, they discuss it, and Dailey will decide what to do. Dailey, however, did not specify whether he conducts his own investigation or simply follows Mr. Rainey's recommendations. Dailey also testified that Mr. Rainey is involved when it comes to hiring, and Rainey has been present during interviews. Rainey also can suggest which of the temporary or contract employees are hired as permanent employees. Dailey, however, stated that he makes the final decisions on these issues. James Gauf testified that Mr. Rainey was present with others when he was being interviewed, and that Mr. Rainey drove Gauf around to give him a tour of the Employer's facility. There is no evidence as to what, if any, role Mr. Rainey had in the decision to hire Gauf.

In around April 2011, the Employer began preparing a written, monthly work schedule for employees on both shifts. Dailey assigned the task of preparing the initial draft of the schedule to Mr. Rainey. Mr. Rainey and Dailey both testified that Mr. Rainey would prepare an initial draft of the schedule and then meet with Dailey, and the two of them would review it, make any necessary changes, and then Dailey would approve a final schedule. For the first month or so, Mr. Rainey testified that he had difficulty preparing the initial drafts of the schedules, and Dailey had to make several corrections before the schedule was finalized. The scope or significance of these changes is not clear from the record. But Mr. Rainey testified there were instances when he would initially assign too many or not enough hours to employees, and that would get corrected when he met with Dailey. Mr. Rainey testified that in the last couple of months he has improved and made fewer mistakes in preparing the schedule. Mr. Rainey did not

testify in any detail about the process he goes through in assigning employees to shifts, plants, or position when he puts together the monthly schedule.

At some point, there were issues with employees making changes to the written, monthly schedule. The Employer posted a memorandum throughout the facility telling employees that they could not deviate from the written schedule without first talking with Todd Rainey. The Employer issued another memorandum informing employees that if they were unable to be at work for their scheduled shift, or they needed to leave before the end of their scheduled shift, they must call Todd Rainey. The testimony varied, however, as to when these memoranda were posted. Some employees believed that they were up before the election, while others believed that they were not posted until after the election.

There is evidence of discipline issued to employees in which Mr. Rainey was involved. Mr. Rainey either was the one who witnessed the offending event, reported the offending event to Wayne Dailey or whoever was acting as the Plant Manager, and/or met with the employee (sometimes with the Plant Manager) to inform the employee of what, if any, discipline would be occurring. Mr. Rainey and Dailey testified that when there was an issue Mr. Rainey would notify Dailey (or whoever was acting as the Plant Manager at the time) about the situation, and the Plant Manager would decide what to do. There is no evidence that Mr. Rainey ever made a decision to (or not to) discipline an employee during the critical period without first consulting with Dailey or whoever was acting as the Plant Manager at the time. There also is no evidence that Mr. Rainey recommended that an individual be disciplined and/or whether any such recommendation was followed without an independent investigation.

There is documentary evidence of incidents in which Mr. Rainey was involved in the discipline of an employee. However, all but one of those incidents occurred following the

election, in late June and early July. The incident that occurred before the election happened on around May 8, 2011. Mr. Rainey observed an employee, Travis Freis, speeding around the Dry Plant in a Caterpillar loader. Mr. Rainey contacted Freis over the radio and told him to slow down. The next day, Freis seriously damaged the hopper in the Dry Plant with the bucket portion of the loader. Mr. Rainey reported the incident to the acting Plant Manager at the time, Vic Kastner, and Kastner had Mr. Rainey bring Freis into a meeting. At this meeting, Freis received a written warning. Mr. Rainey prepared the disciplinary document, and Kastner signed it. There is no additional evidence regarding Mr. Rainey's involvement in the decision to discipline Freis. The other, post-election discipline involved employees being late or absent from work. Mr. Rainey notified the Acting Plant Manager of the incidents, the Acting Plant Manager ultimately decided whether to issue the discipline, and Mr. Rainey often was the individual who gave the disciplinary warning to the employee at issue. The discipline tracked the Employer's procedure, as set forth in the employee handbook.

Mr. Rainey testified that there were around four instances in April and May 2011 in which he was involved in issuing discipline. However, the record does not contain any evidence about these instances, or what Mr. Rainey's specific involvement was in the disciplinary decision.

With regards to employees needing to call Mr. Rainey if they were not going to be at work on time, or if they wanted to be off work, the record does not contain specific evidence as to what Mr. Rainey would do when he received these calls. The record also does not reflect whether Mr. Rainey independently could approve or reject such a request. According to Mr. Rainey, when he received a call from someone stating that he/she was not going to be at work, he would "usually find out why or whatever, and then try to scramble to make sure that their place is

covered." The record is not clear as to how Mr. Rainey would scramble to make sure the person's position was covered. Mr. Rainey testified about instances in which he would call Dailey to report that a person was not going to be coming in, and Dailey would determine if, based on the workload, another employee had to be brought in to cover for the absent employee. The record is insufficient to establish whether Dailey simply followed Mr. Rainey's recommendation, or made his own decision on what to do.

Dailey completed an Employee Performance Evaluation for Mr. Rainey on around August 9, 2011. According to Dailey, this Evaluation covered the period of time from April 13, 2011 to August 9, 2011. According to the Evaluation, Mr. Rainey was promoted to the Crew Leader position effective April 11, 2011. The Evaluation lists Mr. Rainey's "Responsibilities" as "Supervise operations with plant policies and procedures, train employees, responsible for shift schedules, coordinates production startups and meets production goals, communicates with plant manager and [personnel]." As far as his "Accomplishments", Dailey wrote that Mr. Rainey "Has taken on responsibility of plant operations during management transition. Has worked to gain knowledge of how plant operates and looks for ways to improve uptime." Dailey wrote regarding "Job Performance" that Mr. Rainey "Does a good job of preparing the weekly schedule and is able to make changes to meet production needs." As for "Job Productivity", Dailey wrote that Mr. Rainey "Sets high goals and likes to achieve them, tries to get all employees involved in the goals." As for "Overall Job Performance", Dailey wrote that "Todd has made great progress in learning the process and getting to know the employees. Has worked very hard at cross training employees to better utilize the workforce." As far as "Major weak points", Dailey wrote that Mr. Rainey "[t]ends to react quickly to situation when he should step back and analyze the

overall situation before acting." [There is no such Employee Performance Evaluation form for Barrett Oliver.]

Since August 2011, Mr. Rainey has a company email address and a company cell phone. He has had access to a company truck while at the facility for several months.

Ralea Rainey

Ralea Rainey began working for the Employer on around February 7, 2011. Ms. Rainey was hired to work as a laboratory technician / loadout person, and she earned $15.00 per hour. She later received a raise to $15.50 per hour. Ms. Rainey worked solely as a laboratory technician / loadout person until around April 2011. In April 2011, Ms. Rainey began working in the Office, where she assisted Bethany McClain, the then Office Manager. The circumstances that led to Ms. Rainey working in the Office are not clear. However, in April 2011, McClain's employment ended, and Ms. Rainey continued working in the Office, where she remains today. Ms. Rainey has an office, near the Acting Plant Manager's office, with a desk, a computer, phone, etc. Ms. Rainey and Wayne Dailey are the only two who work in the Office.

Ms. Rainey testified about her day-to-day duties in the Office as follows:

> As of today, I go over production paperwork, put together a report from both wet plant, the dry plant, and the lab, that shows how much each plant produced, record their down time, how many tons produced and shipped, and send that information to our corporate office... I receive in parts, packages, take the packing list, make sure that everything the plants need comes in, file that in a envelope I have, and then when the mail comes in I go through the invoices and match those up, put together a purchase order, and mail that information ... After I receive in the parts I file that into a folder I have in alphabetical order by vendor, when the invoices from those vendors come in I match them up with a packing list, and then we send the purchase order to our corporate office... Umm – I do bill of ladings for the trucks that ship, so we have four trucks that will ship, the weight ticket information, the testing information, are all compiled in one composite. I take that

information, fill out where the destination was with the PO and send that to our corporate office. ... Answer the phone.[6]

As far as the amount of time spent on all of the above tasks, Ms. Rainey estimated as follows:

> ...the production information and I would say that takes 20 to 25 percent of my time in a day. Receiving takes place throughout the day. Whenever UPS, FedEx, a trucking company, anybody comes in, so that part would be, you know, could be 5 to 10 percent depending on what we have coming in that day, once the mail comes in, going through the mail, opening it up, putting the receipts, the receipt tickets we have with the bill, getting all that ready to go to corporate is probably 35 to 40 percent of the day. Bill of ladings takes up, I don't know, 20, 25 percent.

Ms. Rainey is involved in human resource related functions. For instance, she has handed out applications and fielded inquiries from individuals seeking employment with the Employer.

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[6] Ms. Rainey testified about each of the various tasks she performs in the Office. As for the production reports, the employees working in the Wet Plant and Dry Plant prepare reports and submit those reports to a mailbox outside the Office at the end of each shift. If the reports are not submitted, then Ms. Rainey will go down to the Dry Plant or Wet Plant and get the information. Upon receiving all the information, Ms. Rainey will add the total number of tons produced in each Plant during the two Shifts, determine how many working hours there were to calculate down time, figure out how many people were in each Plant on each Shift, total it all up for a 24-hour period, and then enter that into a spread sheet that shows the cumulative data for each Plant. She then forwards the spread sheet, via email, to the Employer's corporate headquarters in Brady, Texas. She does this on a daily basis. As for receiving, Ms. Rainey or the maintenance person, Harry Burdett, will order certain parts or supplies. When they arrive, Ms. Rainey will open the boxes and she will compare the contents to the packing list to make sure they actually received what the invoice says was shipped. She will then send the invoice to corporate, and corporate will handling paying the invoice. Tied into receiving is the handling of mail and billing. Ms. Rainey will go through invoices and match them up with orders, present the documents to the manager to review, the manager reviews it and gives it back to her, and then she makes copies of it, and sends a copy to corporate for it to make payment. If there is an issue with an order, Ms. Rainey may contact the vender if she made the order, or have the maintenance man contact the vender if he was the one who placed the order. She testified that these issues occur maybe once a month. As for the bills of lading, Ms. Rainey records all the truck shipments of sand, compiling them into one composite report, and then filling out a Quickbooks report showing how many tons of sand shipped, where it shipped, what grade of sand it was, and the laboratory analysis for shipment. She then sends that to the corporate office and the corporate office takes care of all the billing to customers who purchase the sand. Ms. Rainey testified that she handles the bills of lading because of her experience in the laboratory and her understanding of the whole process.

She has scheduled interviews, and has, in at least one instance, called an applicant (on behalf of the Plant Manager) to offer him a job.[7]

When new employees arrive for their first day of work, Ms. Rainey provides them with packet of information prepared by corporate. She also has a new hire checklist which lists the documents she is supposed to get from the new employees (e.g., I-9 form, W-4 form, signed Payroll Deduction Authorization Agreement, Emergency Contact Information, etc.). She makes copies of the documents and forwards the copies on to the corporate office. Ms. Rainey can access employee personnel files, but she does not have a key to the cabinet where they are kept.

Ms. Rainey also is responsible for collecting the employees' time cards on a weekly basis and then sending them to the Employer's corporate human resource office to be processed. She estimates that she spends 1 percent of her time handling time cards. There are two memoranda that Ms. Railey wrote and posted for employees regarding their time cards. The first, which she drafted in mid-May 2011, reminds employees to turn in their payroll hours by 7:00 am Monday morning to ensure that they are paid correctly. It then goes on to state that if an employee is requesting a floating holiday or paid time off, he/she must have a signed approval form completed before writing the time down on his/her timesheet, in accordance with the Employer's Handbook. The second, which is dated May 31, 2011, reminds employees to use the current time sheet form and to discard the old forms. Ms. Rainey prepared copies of the new forms and distributed them to employees to use.

More than a month after the election, the Employer prepared documents regarding a new 401(k) plan being offered to employees. Ms. Rainey gave out the packets to employees regarding enrollment in the plan. Employees complete the enrollment forms and return them to Ms.

[7] There is no evidence that Ms. Rainey is involved in hiring decisions for the Employer.

Rainey, who then forwards them to the Employer's corporate headquarters. Ms. Rainey will make sure that the employees have completed the forms correctly before forwarding them on to corporate.

Sandra Haskins suffered a non-work related injury over the summer, after the election, and she called and spoke with Ms. Rainey regarding her eligibility for short-term disability. Ms. Rainey spoke with Haskins about her claim and answered certain questions. Ms. Rainey then forwarded Haskins' documentation to the corporate office.

Since around April 26, 2011 through the date of the hearing, Ms. Rainey estimated she worked "maybe five or six shifts" as a laboratory technician / loadout person. She testified that she would do this "when they needed help." Of those five or six shifts, Ms. Rainey estimated that two or three of them were full 12-hour shifts. The rest "were times during the day if they would get totally swamped with ... incoming sand, it takes a second person to do that, so I would go help fill in." Ms. Rainey could not specifically recall when she worked these shifts. She recalled that at least one of the 12-hour shifts was in August 2011, and two or three of the partial shifts were in April and/or May 2011.

CHALLENGES

Barrett Oliver

The Employer challenged the ballot of Barrett Oliver, claiming that he is statutory supervisor within the meaning of Section 2(11) of the Act. Section 2(11) of the Act defines a supervisor as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

The Board addressed the issue of supervisory status in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006) and two companion cases, *Croft Metals, Inc.*, 348 NLRB 717 (2006) and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006). In *Oakwood Healthcare*, the Board reaffirmed that the burden of proving supervisory status rests on the party asserting it. See 348 NLRB at 687 (citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-12 (2001)). The Board further held the party seeking to prove supervisory status must establish it by a preponderance of the evidence, and any lack of evidence in the record is construed against it. *Oakwood Healthcare*, 348 NLRB at 694; *Bethany Medical Center*, 328 NLRB 1094, 1103 (1999).

In *Avante at Wilson, Inc.*, 348 NLRB 1056 (2006), the Board specifically held that generalized or conclusory testimony will not satisfy the evidentiary burden. *Id.* at 1057 (citing *Golden Crest Healthcare Center*, 348 NLRB at 731 (recognizing that "purely conclusory evidence is not sufficient to establish supervisory status," and pointing out that the Board "requires evidence that the employee actually possesses the Section 2(11) authority at issue"); *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995) (conclusory statements without supporting evidence do not establish supervisory authority); and *Sears Roebuck & Co.*, 304 NLRB 193, 193 (1991) (same)). There must be specific evidence regarding a purported supervisor's authority to take or effectively recommend one of the twelve supervisory indicia, as well as the individual's use of independent judgment in making those decisions. *Id.*

The Board noted in *Oakwood Healthcare, supra*, at fn. 27, that in considering whether the individuals at issue possess any of the supervisory authority set forth in Section 2(11) of the Act, Congress emphasized its intention that supervisors are above the grade of "straw bosses,

leadmen, set-up men and other minor supervisory employees." Thus, the ability to give "some instructions or minor orders to other employees" does not confer supervisory status. *Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985). Indeed, such "minor supervisory duties" should not be used to deprive such individual of the benefits of the Act. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974) (quoting Sen. Rep. No. 105, 80th Cong. 1st Sess., at 4). The Board has frequently warned against construing supervisory status too broadly because an individual deemed to be a supervisor loses the protection of the Act. See, e.g., *Chevron Shipping Co.*, 317 NLRB 399, 381 (1995). In addition, for an employee to be deemed a supervisor, he/she must spend a "regular" and "substantial" amount of time performing supervisory functions. *Oakwood Healthcare, Inc. supra* at 694. Finally, it should be observed that job titles are not dispositive. As the Board has held, "[t]he status of a supervisor under the Act is determined by an individual's duties, not by his title or job classification." *T.K. Harvin & Sons, Inc.*, 316 NLRB 510, 430 (1995).

Regardless of which one (or more) of the twelve indicia the purported supervisor possesses, he or she still must exercise independent judgment in taking those actions, and the decisions cannot be merely routine or clerical. In *NLRB v. Kentucky River Community Care,* the Supreme Court rejected the Board's interpretation of "independent judgment" to exclude the exercise of "ordinary professional or technical judgment in directing less skilled employees to deliver services." 532 U.S. at 713. Following the admonitions of the Supreme Court, the Board in *Oakwood Healthcare,* adopted a definition of the term "independent judgment" that "applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise....professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the

12 supervisory functions of Section 2(11)." 348 NLRB at 692. The Board noted that the term "independent judgment" must be interpreted in contrast with the statutory language, "not of a merely routine or clerical nature." *Id.* at 693. Consistent with the view of the Supreme Court, the Board held that, "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." *Id.* (citations omitted). However, "the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." *Id.* The Board held as follows on the meaning of "independent judgment":

> To ascertain the contours of "independent judgment," we turn first to the ordinary meaning of the term. "Independent" means "not subject to control by others." *Webster's Third New International Dictionary* 1148 (1981). "Judgment" means "the action of judging; the mental or intellectual process of forming an opinion or evaluation by discerning and comparing." *Webster's Third New International Dictionary* 1223 (1981). Thus, as a starting point, to exercise "independent judgment" an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.

Oakwood Healthcare, 348 NLRB at 692-3.

In page 3 of its post-hearing brief, the Employer argues that Barrett Oliver possesses the authority to assign and to responsibly direct.[8] After reviewing the evidence (or lack thereof), I find that there is insufficient evidence that Oliver regularly assigns or responsibly directs employees, using independent judgment.

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[8] The Employer states in its Post-Hearing Brief that "Oliver possesses the authority, inter alia, to responsibly direct and assign work as well as other Section 2(11) indicia of supervisory status." The Employer, however, does not specify any other of the enumerated indicia of supervisory authority that Oliver allegedly possesses. The Employer has not argued that Oliver has the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees, or to adjust their grievances, or effectively to recommend such action. As a result, I will analyze whether Oliver is a statutory supervisor based upon his purported authority to assign and responsibly direct.

Authority to Assign

With regard to the Section 2(11) criterion "assign," the Board has interpreted the term "to mean the act of 'designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee.'" *Golden Crest Healthcare Center*, 348 NLRB at 728 (quoting *Oakwood Healthcare*, 348 NLRB at 689). The Board has emphasized that "[t]o "assign" for purposes of Section 2(11) 'refers to the ... designation of significant overall duties to an employee, not to the ... ad hoc instruction that the employee perform a discrete task.'" *Golden Crest Healthcare Center*, 348 NLRB at 728-9 (quoting *Oakwood Healthcare*, 348 NLRB at 689). The Board has further clarified that, "...choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to 'assign.'" *Oakwood Healthcare*, 348 NLRB at 689. Moreover, to establish the authority to assign, it must be shown "that the putative supervisor has the ability to require that a certain action be taken; supervisory authority is not established where the putative supervisor has the authority merely to request that a certain action be taken." *Golden Crest Healthcare Center*, 348 NLRB at 729). And as with all of the Section 2(11) indicia, there must be evidence that the putative supervisor exercised independent judgment in making assignments.

In support of its argument that Oliver possessed and exercised the authority to (re)assign employees, the Employer cites to the testimony of Bob St. Clair, Wayne Dailey, Ethan Kogutkiewicz, Todd Rainey, and Sandra Haskins. St. Clair testified that Oliver would direct him as to when to continue running a conveyor or to stop and replace a conveyor belt. If there were "a rip in the belt, say a small rip, and if I called Barrett to come down, he'd say 'oh run it 'til day

shift gets here' ..." Although the Employer cites this testimony as evidence of Oliver assigning employees, there is no evidence as to how this involved the exercise of independent judgment. Oliver testified that at the end of the PM-AM Shift, he would report any issues to Todd Rainey, and it would be for Mr. Rainey (or someone else) to decide what to do. Keeping a belt that was not broken running until the day shift, when Rainey would be there to decide what to do, is consistent with this practice. Additionally, St. Clair testified that if a situation presented a safety concern, all employees had the ability to decide to shut a line down. St. Clair further testified that if a belt broke in the Wet Plant where he worked, the employees working with him would stop and help in fixing or replacing the belt. They did not wait for Oliver or anyone else to tell them to fix or replace it, because if the belt did not work, then they would not be able to do their jobs. As such, based upon the evidence, I do not find that the above testimony establishes Oliver had or exercised the authority to assign, using independent judgment.

The Employer next cites to St. Clair's testimony about the instances in which Oliver would reassign him to job or task that was different than what was written on the schedule. St. Clair's testimony regarding these instances, as set forth above, makes clear that Oliver likely reassigned him because he (St. Clair) was "the only other person there" or "might have been the only person that was tasked trained on that piece of equipment." Assigning someone to perform a job or task when he/she is the only option does not involve the use of independent judgment, because there is nothing to be discerned, evaluated, or compared. There was one option, and in the situations St. Clair testified about, he was it.

St. Clair also testified that Oliver would on occasion redirect a temporary Manpower employee named Chuck Miller to go from working in the "wet shack" to the "dry operation." St. Clair did not provide any more details. He did, however, make clear that it was the

Employer's policy to not allow Manpower temporary employees to operate any of the loaders or other machinery, and that they were limited to cleaning and taking samples. Based upon this evidence, I find that even assuming that Oliver's involvement could be interpreted as authority to make (re)assignments of these temporary employees, the evidence does not demonstrate that the authority was exercised with the "independent judgment" necessary to elevate it above the merely "routine or clerical." *Shaw, Inc.*, 350 NLRB 354, 357 (2007) (rotating "essentially unskilled and routine duties among available crewmembers" does not involve the use of independent judgment and is not supervisory).

The Employer also cites to testimony from Wayne Dailey regarding Oliver's purported authority to (re)assign employees. Dailey testified that he designated Oliver to make decisions on the PM-AM Shift, and that he gave Oliver the authority/responsibility to keep the operations running on the PM-AM Shift. Dailey testified that Oliver had the authority to decide if the plant had to be shut down and the employees sent home. Oliver did not corroborate this. He testified that he would have to check with Mr. Rainey or Dailey for approval before shutting the facility down and/or sending employees home. According to the record, there was only one instance in which the facility was shut down and employees sent home during the time Oliver was the Crew Leader of the PM-AM Shift, and it occurred because there was a major mechanical problem that halted production. Oliver testified, without contradiction, that after the problem could not be fixed, he called and spoke to Mr. Rainey, and Mr. Rainey told him that it was okay to shut the facility down and send the employees home. [It was not clear whether Mr. Rainey consulted with anyone prior to talking with Oliver.] I find these circumstances do not support the Employer's claim that Oliver had the authority to decide, using his independent judgment, to shut the facility down and/or send employees home.

Dailey also testified that Oliver had the authority to call Harry Burdett, the maintenance person, if there were issues at the facility that required repair, and that Oliver had and used his authority to call Burdett at home to have him come in to the facility, without first getting Dailey's approval.[9] Burdett confirms that Oliver called him at times to report an issue, and that Burdett went to the facility in response to Oliver's calls to address the issue. There is no dispute that Burdett is the Employer's only skilled maintenance mechanic at the facility, and there is no dispute that Burdett is always on-call. Under these circumstances, I find that there is no independent judgment involved in Oliver's decision to call Burdett in to address a problem when he (Burdett) is the only option Oliver had.

The Employer also cites to portions of Ethan Kogutkiewicz's testimony regarding Oliver's role in reassigning him to support its position that Oliver had the authority and used independent judgment in exercising his authority. The Employer relies upon Kogutkiewicz's testimony that Oliver "would tell me to get in the loader if somebody was late, didn't show up; I would run loader, even though I was not scheduled to do so." Kogutkiewicz, however, testified that he did not know why Oliver selected him, and the Employer never questioned Oliver about why he selected Kogutkiewicz. As such, the evidence is insufficient to establish that Oliver used independent judgment in making this reassignment. Kogutkiewicz also testified that Oliver "told me to grease, after that, he had sent me down to the dry plant and told me to clean, starting at the top level, working my way down. And then, after that, there's a company truck works the plant—he [Oliver] gave me and another person, Bob St. Clair, permission to take the truck. At the time, we were setting up hangers for fire trucks to sit in the parking lot, and we used the truck

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[9] Dailey testified that he received calls from Oliver during the night 2 or 3 times in 3 or 4 months. He did not provide specifics about these conversations.

to go back and forth, hauling from shop." Kogutkiewicz testified that in order to grease, the person doing the job needed to use of a Genie Lift, and Kogutkiewicz was the "only one signed off on the Genie Lift at the time." As stated previously, when there is only one choice for who can be assigned a job or task, there is no use of independent judgment. As for the order in which Kogutkiewicz was to clean, the Board has held "choosing the order in which the employee will perform discrete tasks within those assignments (e.g. restocking toasters before coffee makers) would not be indicative of exercising the authority to 'assign.'" Finally, with regards to the use of the truck, Kogutkiewicz asked Oliver if he could use an available truck to set up hangers, and Oliver said he could use the truck. I do not view this as evidence of independent judgment. The Employer next cites to an instance in which Oliver had Kogutkiewicz operate a loader for part of the shift because the employee scheduled to operate the loader was late, and argues that Oliver used independent judgment in reassigning Kogutkiewicz. Kogutkiewicz testified that he was present when Oliver received the call from the employee stating that he was going to be late, and Oliver turned to him and put him on the loader. Kogutkiewicz testified that there was a utility person working at the time that "could have just as easily operated" the loader as him. Kogutkiewicz testified that Oliver never said anything to him as to why he (Oliver) chose him to operate the loader. Kogutkiewicz's testimony undermines the Employer's argument that this decision involved the exercise of independent judgment, because if they (Kogutkiewicz and the unidentified utility person) both were equally as capable of operating the loader, then there was nothing to discern, evaluate or compare.

Finally, Kogutkiewicz testified that Oliver would check on his progress throughout the night. The Employer argues that this is evidence that implies that Oliver would oversee and provide Kogutkiewicz with instruction throughout the night. However, Kogutkiewicz did not

view Oliver as giving him instructions. He testified that he "wouldn't say [Oliver] would really tell me that way. Sometimes he would come in and help if I was in there by myself ..." This evidence does not support a finding that Oliver reassigned Kogutkiewicz, but rather worked with him to make sure the work was completed.

The Employer also cites to the testimony of Todd Rainey regarding his observations of Oliver when the two worked together on the PM-AM Shift for a brief period of time in April 2011. Mr. Rainey was asked about how Oliver assigned employees, and Mr. Rainey testified that Oliver would assign employees "basically who ...[Oliver] thought was good at that spot, and sometimes he'd rotate people around." This testimony alone is insufficient to establish Oliver had the authority to regularly assign employees, using his independent judgment, because it does not provide sufficient detail as to how often this occurred, how Oliver made decisions, and what the circumstances were to rotating people around. As previously stated, rotating routine duties among available crewmembers does not involve the use of independent judgment. *Shaw, Inc.*, supra.

From April through the date of the election, employees were assigned to a shift, a plant, and a position based upon what was written on the schedule Todd Rainey prepared.[10] Mr. Rainey prepares the schedule with the involvement and oversight of Wayne Dailey. Mr. Rainey testified that when he first began preparing a draft of the monthly schedule in around April 2011, he asked Oliver his opinion of the various employees working on the PM-AM Shift, and Oliver shared his opinions. Mr. Rainey based his initial assignments of employees on the PM-AM Shift on what

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[10] There were witnesses who testified that Oliver made assignments during the shift change, and that PM-AM Shift employees knew where they were going to work based on what Oliver told them. However, the witnesses who testified to observing Oliver make these assignments did not know what he was basing those assignments upon. Several witnesses stated that he had a written document with him when making assignments, but they did not see what the document said.

Oliver said to him. Mr. Rainey then presented his draft schedule to Wayne Dailey for his review. According to Mr. Rainey, Dailey made changes to the initial schedule draft and the schedule had to be reworked. As a result, it is not clear how much of what Oliver had to say translated into actual assignments. Additionally, while Mr. Rainey may have consulted with Oliver in preparing the initial schedule, there is no evidence that Oliver was consulted on future schedules. I, therefore, find any involvement Oliver may have had in offering his opinions regarding the employees working the PM-AM Shift in early April to be insufficient to establish that he had the authority to assign or effectively recommend the assignment of employees. Additionally, as discussed below, it is not clear how much discretion, if any, is involved in preparing the work schedule.

To the extent that Oliver occasionally shifted people around from what was on the schedule to fill a need because someone was absent, late, etc., the Board has held that such conduct does not amount to assignment. In *Alstyle Apparel*, 351 NLRB 1287 (2007), the Board found that a shift leader did not possess the authority to assign work within the meaning of Section 2(11) under circumstances very similar to those present here. In *Alstyle Apparel*, the employer's general manager prepared a preprinted form entitled "Machine Assignment Form" which listed the machines that were to be used on a shift. The shift leader in dispute used the form and his knowledge of employees' capabilities to assign an employee to work on a particular machine. The judge, whose opinion was adopted by the Board, found that the shift leader's machine assignments were analogous to the rotation of different tasks described in *Croft Metals*, supra, and more closely resembled ad hoc instruction rather than a work assignment and thus did not reflect the authority to "assign" as described in *Oakwood Healthcare* and *Croft Metals*, supra.

The last witness the Employer cites to is Sandra Haskins, who worked with Oliver on the PM-AM Shift. The Employer cites to Haskins testimony that Barrett took the lead as far as saying, "This needs to be done," and then called everyone in to do it. There is no dispute that Oliver was a Crew Leader on the PM-AM Shift during the critical period. He spoke with Mr. Rainey prior to the start of the shift to determine what work was completed during the AM-PM Shift, and what work still needed to be completed during the PM-AM Shift. The employees working on the PM-AM Shift would be informed, often by Oliver, what work needed to be completed on their shift. The employees who testified all confirmed that they knew how to do their jobs, and knew how to make sure things got done. Haskins, and other witnesses, testified that if a problem arose (e.g., a broken belt, a broken auger, etc), the employees working in the area would work together to deal with the problem. Haskins and St. Clair testified about specific examples when this occurred, and how the employees worked together, without being assigned or directed, to take the necessary steps to fix the problem. Everyone, including Oliver, pitched in to get the problem addressed. There is no evidence that Oliver had to make assignments, using independent judgment, to address these issues.

Moreover, the Board has held with respect to assignment authority that it must be shown that the putative supervisor has the ability to require that a certain action be taken. *Golden Crest Healthcare Center*, 348 NLRB at 729. There is no record evidence that Oliver has any authority to *require* that employees actually perform certain tasks. The Employer acknowledges that if Oliver was aware of an issue with an employee that occurred during the PM-AM Shift, Oliver would report that issue to Mr. Rainey or Dailey.

Based on the evidence cited by the Employer, I find that the Employer has not established that Oliver had the authority to assign employees, using independent judgment. The evidence

does not support a finding that Oliver had the authority to regularly assign someone to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties. In the few instances cited by the Employer in which Oliver reassigned someone, they involved ad hoc instruction, often in emergency situations when there was no one else available. This does not reflect the use of independent judgment. As for the rest, they are too few and infrequent to support a finding that Oliver had the authority to assign. As a result, I find that Employer has not met its burden.

Responsibly Direct

The Board has defined the parameters of the term "responsibly to direct" as follows: "If a person on the shop floor has 'men under him,' and if that person decides 'what job shall be undertaken next or who shall do it,' that person is a supervisor, provided that the direction is both 'responsible'...and carried out with independent judgment." *Oakwood Healthcare*, 348 NLRB at 691. The Board found that "for direction to be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employees are not performed properly." *Id.* at 691-2. In clarifying the accountability element for "responsibly to direct" the Board noted that, "to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." *Id.* at 692. The Board has further held that evidence of actual accountability must be presented to prove

responsible direction. *Alstyle Apparel*, 351 NLRB 1287, 1287 (2007) and *Golden Crest Healthcare Center*, 348 NLRB at 731).

The Employer has failed to present any evidence that Oliver was delegated the authority to direct the work of others and/or the authority to take corrective action if necessary. According to Oliver, at the time he was promoted to Crew Leader in January 2011, the only instruction he received from then Plant Manager Rice was to "make sure that ... everything kept moving, just keep checking up on stuff, keep things right going with everybody else." He received no other instruction, and he was not delegated any other authority. Additionally, based upon the evidence, if an issue relating to an employee arose when Oliver was the Crew Leader of the PM-AM Shift, the record reflects that Oliver contacted Todd Rainey or the Plant Manager and reported the issue to one of them for one them to deal with it. There is no evidence that Oliver ever attempted to take any corrective action against an employee working with him on the PM-AM Shift. Furthermore, there is no evidence that he faced any adverse consequences if the individuals who worked the PM-AM Shift with him failed to perform their work properly, or that he was in any way held accountable by the Employer for the work performance of employees working on the PM-AM shift when he was their Crew Leader. The Employer has cited to comments on the Change Status Form that former Plant Manager Rice completed in January 2011, in which he notes that Oliver had done a good job of stepping up to the plate and earning his promotion, as evidence of how Oliver was being held accountable, and being rewarded, for how he directed the employees working on the PM-AM Shift. Since Rice did not testify, I do not know what his intent was in making this comment. Additionally, since the comment was made based upon Oliver's performance prior to becoming a Crew Leader, I cannot conclude that it is evidence of the Employer holding him accountable for his performance as a Crew Leader. As a result, I find

that the Employer has not carried its burden of establishing that Oliver possesses the authority to responsibly direct employees. *Golden Crest Heathcare Center, supra.*

The Employer's argues Oliver responsibly directed employees. It cites to the situation(s) in which Oliver instructed Sandra Haskins, a laboratory technician / loadout person on the PM-AM Shift, to release sand to trucks for delivery that was below the Employer's 90 percent grade requirement.[11] In response to questions from the Employer, Campobello testified about the policy and about her conversation with Haskins:

> Q: Okay. And was there ever a situation where there was a question about the quality control on a load that she was involved in?
> A: Yes, there was.
> Q: And can you describe that for us?
> A: Yes. What would take place is -- I was in the lead, so they were directed, if I was not available or at the plant, they were asked to call me if there was a load that would go out or was tested and it would be low grade, which our grade was anything 90 percent or lower, that they were to contact me and that I would either call Wayne Dailey or my other supervisor, which is -- above supervisor, which is Dae Locklear. And we would discuss it, and whether we would send it to rail yard or we would dump it back on property, like I had stated earlier. On several occasions, I would come in and I would notice that I -- we do a composite. When we send the sand to the rail yard, in each particular railcar you send four loads -- truck semi loads -- per railcar. And they got to do a composite on that. Well, when I would come in in the mornings I would look at them composites and see that there was a low grade on certain ones, and I would ask Sandy, directly, "I was not called, why wasn't I called?"
> ...
> A: I asked her why I was not informed of this or called, and she stated that she took care of it through her night supervisor, Barrett Oliver, on several occasions.

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[11] Although Campobello testified that this occurred on several occasions, the documents introduced in the hearing only involve one instance in which this occurred. This one instance occurred in early April 2011, and, according to the paperwork, Haskins released sand that was 88 percent grade "per Barrett." Haskins confirmed that she obtained Oliver's permission before releasing the load in question, and that she would not release a load that was below 90 percent grade without his permission. Haskins acknowledged that she was supposed to contact Campobello if issues arise in the laboratory during the PM-AM Shift, but Haskins did not contact Campobello. Haskins also testified that she did not know if Oliver contacted anyone before giving her permission to release the load for delivery. The Employer did not question Oliver about this situation.

The Employer has not introduced any evidence that Oliver had the authority to give employees permission to release sand that was below the Employer's 90 percent grade requirement, and the above testimony suggests that Oliver should not have allowed the sand to be released without first consulting Campobello, because Campobello's testified that laboratory employees are to contact her with issues, and then she will contact the Plant Manager (Dailey) or a regional manager (Dae Locklear) for them to determine what to do.[12] Additionally, there is no evidence as to how Oliver made the decision to give Haskins permission to release the sand. The Employer did not question Oliver about how he made his decision, or whether he consulted with anyone else before giving Haskins permission to release the sand.

Based upon the record, I find that there is insufficient evidence to conclude that Oliver had the authority to responsibly direct employees, using independent judgment. I, therefore, conclude that the Employer has failed to meet its burden.

Ostensible Supervisory Authority

The Employer contends that Oliver had "ostensible supervisory authority" because the Employer identified him as a supervisor, employees viewed him as a supervisor, and he held himself out as a supervisor. Where the employees looked on the individual in question as a supervisor and "there is valid basis for such judgment on their part," this may be given some weight in the resolution of the supervisory question. *Bama Co.*, 145 NLRB 1141 (1964). However, the fact that an individual is held out as a supervisor is not necessarily dispositive of supervisory status. *Williamette Industries,* 336 NLRB 743 (2001); *Pan-Oston Co.,* 336 NLRB 305 (2001); and *Blue Star Ready-Mix Concrete Corp.*, 305 NLRB 429 (1991). In *Carlisle*

[12] Haskins confirmed that she is supposed to contact Rebecca Campobello if any issues arise in the laboratory during the PM-AM Shift, but that she (Haskins) tries to do that as little as possible.

Engineered Products, 330 NLRB 1359 (2000), the Board stated: "It is well established that rank and file employees cannot be transformed into supervisors merely being invested with that title." It is my conclusion that is exactly the situation with Oliver. He had the title of supervisor, but did not possess any supervisory authority within the meaning of Section 2(11) of the Act. I do not view this as a case in which perception translates into reality.

Secondary Indicia

The Employer next cites to evidence of secondary indicia of supervisory authority in support of its argument that Oliver is a statutory supervisor. It is well settled that secondary indicia, i.e., indicators of supervisory status not specifically enumerated in Section 2(11), are considered only if there are one or more 2(11) indicia present. See *International Transportation Service,* 344 NLRB 279, 285 (2005), enf. denied on other grounds 449 F.3d 160 (2006); *Ken-Crest Services,* 335 NLRB 777, 779 (2001). Here, because I find there is insufficient evidence of any of the 2(11) criteria, any evidence of secondary indicia is irrelevant.

The Employer argues that Oliver was the highest ranking individual on site for the PM-AM Shift during the critical period. The Board has held that "[t]he status of being the highest ranking employee on site falls within the category of secondary indicia of supervisory authority" and that such status does not establish supervisory status absent a showing of one of the primary indicia of supervisory status enumerated in Section 2(11). *Golden Crest Healthcare Center*, 348 NLRB at 730 fn.10. The Employer also argues that, at one point during his employment, Oliver had various keys to the facility that others did not have. Oliver confirmed he once had keys, but testified that in early 2011, the Employer changed the locks, and he was not given a new set. I, therefore, do not find the fact that he once had keys to be persuasive.

Overall, I find that the Employer has failed to meet its burden regarding Barrett Oliver. I find the evidence shows the Employer's production process was routine, and the limited authority possessed by Oliver over the employees working on the PM-AM Shift when he was the Crew Leader was exercised in a routine manner, without the use of independent judgment, and, thus, was insufficient to establish that he possess any primarily indicia of supervisory authority. As the Employer has not met its burden of establishing primary indicia of supervisory status, any evidence of secondary indicia is irrelevant.

Todd Rainey

The Petitioner challenged the ballot of Todd Rainey, claiming that he is a supervisor within the meaning of Section 2(11) of the Act. The Petitioner contends that Mr. Rainey has the authority to hire, assign, responsibly direct, and discipline employees, using independent judgment. I will examine each below.

Hire

The Petitioner contends that Mr. Rainey has the authority to hire or effectively recommend someone for hire, using his independent judgment. As previously stated, Wayne Dailey testified that Mr. Rainey is involved when it comes to hiring, and Mr. Rainey has been present during interviews. Mr. Rainey also can suggest which of the temporary or contract employees are hired as permanent employees. Dailey, however, has stated that he makes the final decisions on these issues. The record does not establish that Mr. Rainey can effectively recommend hiring employees, using his independent judgment. The Board has held that the authority to "effectively recommend" generally means that the recommended action is taken without independent investigation by superiors, and not simply that the recommendation is

ultimately followed. *Children's Farm Home*, 324 NLRB 61, 61 (1997). The record does not reflect that Mr. Rainey had this authority.

The Petitioner points to Mr. Rainey's involvement in the hiring of James Gauf. Gauf testified that when he went to the Employer's facility to fill out an application, Mr. Rainey was present in the Office, and Mr. Rainey asked him if he had ever driven a loader. Gauf answered and left his application. Gauf was then called in for an interview. Mr. Rainey was present, along with Wayne Dailey and Manager Dae Locklear, for the interview of Guaf. Following the interview, Mr. Rainey drove Gauf around in his truck for a tour of the Employer's facility. Gauf was later hired. The issue, however, is there is no evidence in the record establishing what, if any, role Mr. Rainey had in the decision to hire Gauf. As such, I cannot determine whether he effectively recommended hiring Gauf, using his independent judgment. I cannot infer that he did, particularly when the Plant Manager and Area Manager were also involved in the interview and likely the decision to hire Gauf. Based upon this evidence, I cannot conclude that Mr. Rainey has the authority to effectively recommend someone for hire, using his independent judgment.[13]

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[13] The Petitioner also cites to testimony from Oliver about a situation in which Mr. Rainey was involved in "hiring" outside contractors to repair a broken part for the Employer, and about another situation in which Mr. Rainey called an outside contractor to fix the seals on certain equipment. The evidence regarding these instances is limited. Mr. Rainey did not provide testimony to establish that he exercised independent judgment in making this decision, or whether he had the authority to do so. Regardless, I do not view this as hiring employees. Mr. Rainey's background is in construction. He may have had contacts within the industry that could have performed the jobs in question., and he may have used those contacts to find someone who could make the necessary repairs. Without more, I cannot conclude this constitutes hiring of employees, particularly when, as it appears, the contractors were hired to come in for a particular, limited repair job. Additionally, Dailey testified that he had the final say on all hiring decisions. As such, Oliver's testimony alone is insufficient to establish that Mr. Rainey had the authority to hire. The evidence as a whole also is insufficient to establish that he had the authority to hire.

Assign and Responsibly Direct

The Petitioner also contends that Mr. Rainey has the authority to assign and responsibly direct, or effectively recommend both. The Petitioner bases this contention on Mr. Rainey's role in preparing the monthly work schedules and any changes to those schedules, and it argues that the task is not routine or clerical, but rather requires a level of knowledge necessary to running the facility. The Petitioner also cites to Dailey's evaluation of Mr. Rainey (completed in August 2011) in which Dailey commented that Mr. Rainey "[d]oes a good job of preparing the weekly schedule and is able to make changes to meet production needs."

In reviewing the record, I find preparing the monthly schedule involves assigning employees to a particular shift (AM-PM or PM-AM), particular dates, a particular location (Wet Plant, Dry Plant, or Laboratory), and a particular position (loader operator, operator, laboratory technician / load out person, maintenance, etc.). As such, it involves "designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee.'" *Golden Crest Healthcare Center*, 348 NLRB at 728 (quoting *Oakwood Healthcare*, 348 NLRB at 689). This issue, however, is whether Mr. Rainey's involvement in preparing this schedule is merely routine or clerical or if it involves the use of independent judgment. In reviewing the record, I find there is insufficient evidence as to how Mr. Rainey went about preparing the monthly schedule, and what, if any, ascertaining, evaluating, or comparing of data he was required to do. Mr. Rainey testified that initially he used old schedules that then Plant Manager John Rice and others used in making assignments. He also testified that, initially, he asked Oliver's opinion, as well as the opinion of then Crew Leader Mike Rizzo. Mr. Rainey asked them about who performed best at which position during their shifts, and then applied it when preparing the initial

draft of his first schedule. But he did not consult with Oliver or Rizzo in preparing subsequent schedules. Mr. Rainey testified that he would present the schedule to Dailey for his review and approval. Mr. Rainey and Dailey confirmed that initially there were issues with the draft schedules Mr. Rainey prepared, and Dailey would have him make corrections before the schedule was finalized. Mr. Rainey testified that he had difficulty preparing the first couple of schedules, but that he later improved and was given more discretion in preparing them. It is not clear from the record whether Mr. Rainey improved in preparing the schedule before or after the June 9 election, and it is not clear how he improved.

With regards to assigning additional shifts, Mr. Rainey confirmed that employees would come to him and ask if they could be assigned extra hours, but that he would talk to Dailey before making the assignment. As to those conversations, Mr. Rainey testified that Dailey might say "that may not be a good idea." However, Mr. Rainey could not, during his testimony, recall an instance in which that occurred.

As previously stated, Mr. Rainey gives his draft of the schedule to Dailey for his review and, if necessary, revision. I asked Mr. Rainey if he could recall instances in which Dailey changed or did not approve something that he (Mr. Rainey) had put on the initial schedule, and Mr. Rainey answered, "Oh, not right off hand, no. We have our moments with the schedule and stuff, but for the most part he agrees with it."

Overall, the record is limited as to what factors Mr. Rainey considers in preparing the monthly schedule. He stated he is required under the Employer's policy not to schedule someone for more than six days in a row, and he tries to give employees two to three days off after working five days. However, there is no evidence to what, if anything, else Mr. Rainey factors in when preparing the work schedule. As such, I cannot determine, based upon the

limited evidence in the record, whether the schedule making process involved the use of independent judgment or not.

The Petitioner cites to the memoranda that the Employer posted notifying employees that they needed to contact Mr. Rainey if they wanted to make changes to the schedule, were going to be late, or needed to be absent. As previously stated, there is a dispute as to whether these memoranda went up before or after the June 9 election. Assuming that they went up before the election, the issue is what, if anything, Mr. Rainey would do upon receiving such a call. He testified that he would "usually find out why and whatever, and then try to scramble to make sure their place is covered." This might happen once or twice a month. He, however, did not provide specific details about what he would do to make sure their place is covered. He indicated that he might call an employee to come in or have the crew run short. He testified that he first would have to consult with Dailey before making a decision. He could not, however, recall a situation in which Dailey disagreed with what he wanted to do to deal with the situation.

The Petitioner also points out that in the Employer's handbook there are disciplinary repercussions if an employee fails to notify the Employer if they are going to be late or absent. However, there is no evidence that Mr. Rainey uses independent judgment in that process.

As a result, I find that the Petitioner has not met its burden of establishing that Mr. Rainey has the authority to assign or responsibly direct employees, using independent judgment, on more than a merely routine or clerical basis.

Discipline

The Petitioner also contends that Mr. Rainey has the authority to discipline or effectively recommend discipline. The record evidence consists of Mr. Rainey's testimony and documents reflecting his involvement in disciplining an employee. As previously stated, all but one of the

documents involved instances that occurred well after the June 9 election. The one that occurred before the election, which is previously described, involves an employee who sped around the facility in a front loader and then damaged a hopper with the front-end of the loader. Mr. Rainey verbally warned the employee about speeding, and he later reported the damaging of the hopper to the Regional Manager, Vic Kastner. Kastner told Mr. Rainey to bring the employee in, and the employee was, according to the document, suspended. There is no evidence as to whether Kastner made the decision to suspend on his own, or if he followed any recommendation Mr. Rainey may have made. However, even given the seriousness of the infraction and the damage to the hopper, I cannot conclude that the decision or recommendation to issue a warning involved the use of independent judgment on the part of Mr. Rainey. The Employer's Handbook, Section 4.13, expressly addresses damage to and/or misuse of property, and it provides that careless damage to property will not be tolerated and can result in disciplinary action, up to and including termination. All of the discipline in which Mr. Rainey was involved after the election involved attendance-related issues, and, from the evidence in the record, Mr. Rainey followed the disciplinary procedure set forth in the Employer's Handbook, without exception. There is no evidence establishing that he used discretion or independent judgment.

According to Mr. Rainey's testimony, he was involved in around four other disciplinary situations that occurred before the election. Mr. Rainey, however, did not elaborate on those particular situations, and there is insufficient evidence regarding his involvement and/or whether he used independent judgment in any of those situations.

As a result, I find that there is insufficient evidence in the record to determine that he disciplined or effectively recommended discipline, using his independent judgment.

Overall, I find that the Petitioner has failed to meet its burden of establishing that Mr. Rainey is statutory supervisor.

Ralea Rainey

The Petitioner bears the burden of establishing that Ralea Rainey should be excluded from the unit as an office clerical. *The Kroger Company*, 342 NLRB 202, 203 (2004) (citing *Queen Kapiolani Hotel*, 316 NLRB 655, 664-665 (1995) (party seeking to exclude an individual from voting for a collective-bargaining representative has the burden of establishing that individual is ineligible to vote)). The Board has long drawn a distinction between "plant clericals" and "office clericals." *Caesars Tahoe*, 337 NLRB 1096, 1098 (2002). This distinction is "rooted in community-of-interest concepts, ... albeit it is occasionally difficult to discern." *Kroger*, 342 NLRB at 204 (quoting *Caesars Tahoe*, 337 NLRB at 1098). With respect to plant clericals, the "test generally is whether the employees' principal functions and duties relate to the production process, as distinguished from general office functions." *Id.* The Board has held that '[c]lericals whose principal functions and duties relate to the general office operations and are performed within the office itself are office clericals who do not have a close community of interest with a production unit. This is true even if those clericals spend as much as 25 percent of their time in the production area and have daily contact with production personnel." *Mitchellace, Inc.*, 314 NLRB 536, 536-37 (1994)(citing *Container Research Corp.*, 188 NLRB 586, 587 (1971)).

In reviewing the evidence, there is no dispute that Ms. Rainey worked full-time as a laboratory technician / load out person from February 2011 through April 2011. In April 2011, Ms. Rainey moved to work in the Office and replaced the Office Manager, Bethany McClain. There is no dispute Ms. Rainey has predominately worked in the Office ever since, and there are

no plans to replace her. In the Office, Ms. Rainey has a separate work area with a desk, a computer, a printer, a phone, and other related office equipment. Her work area is near the Plant Manager's office. There are no other employees who regularly work in the Office. The Office is several hundred feet from the Wet Plant and from the Dry Plant.

Ms. Rainey testified that she spends 35 to 40 percent of her day opening and going through the mail, matching receipt tickets with invoices, having the manager review those materials, and forwarding matched documents onto the Employer's corporate office in Brady, Texas. She spends 20 to 25 percent of average day handling bills of lading. Ms. Rainey takes all the outgoing shipment information, compiles it into one composite report, and then fills out a Quickbooks report showing how many tons of sand shipped, where it shipped, what grade of sand it was, and the laboratory analysis for the shipment. She then sends that information to the Employer's corporate office which will handle billing the customers who purchased the sand. Ms. Rainey also performs 20 to 25 percent of her time gathering information from the Plants for the production reports she prepares and then submits to the Employer's corporate office. She testified that the information usually is left in the mailbox outside the Office, but there are instances in which she will need to go down into the Plants to get the reports herself. She spends 5 to 10 percent of her time dealing with trucking companies (e.g., UPS, Federal Express, etc.). She also will order and receive certain supplies (e.g., paper, ink, etc.) for the Office and for the laboratory. In addition to the above, Ms. Rainey estimated that she spends 1 percent of her time typing, 1 to 2 percent of her time handling human resource tasks, and 1 percent of her time collecting and forwarding time sheets to the Employer's corporate headquarters. Almost all of this Ms. Rainey does from her work area in the Office.

The Board has held that the "fact that clerical employees exercise some secretarial skills is no obstacle to finding them to be plant clericals, if other factors link them to the production process and other production employees." *Kroger*, 342 NLRB at 204 (quoting *Caesars Tahoe*, 337 NLRB 1099). Typical plant clerical duties involve tasks such as timecard collection, transcription of sales orders to forms to facilitate production, maintenance of inventories, and ordering supplies. *Hamilton Halter Co.*, 270 NLRB 331 (1984); *Kroger, supra*; *Caesars Tahoe, supra*. In comparison, typical office clerical duties are billing, payroll, phone, and mail. *Dunham's Athleisure Corp.*, 311 NLRB 175 (1993); *Mitchellace, Inc., supra*; and *Virginia Mfg. Co.*, 311 NLRB 992 (1993).

As reflected above, Ms. Rainey performs tasks that would qualify as plant clerical duties (e.g., timecard collection, ordering supplies, etc.). However, she appears to do little to facilitate production. In other words, there is little functional integration between what she does in the Office and what the production employees do in the Plants. Unlike in *Hamilton Halter Co.*, where the clerical employees at issue were primarily responsible for the transcription of sales orders to facilitate production, there is no evidence that Ms. Rainey handles or transmits incoming orders to the employees working in the Plants, or works with the other employees in processing the sand (other than in the few instances when a large amount of wet sand comes in and there are not enough employees to handle it, and she goes to assist). She does play a role in ordering certain supplies for the Office and the laboratory. But the orders for technical supplies are handled by the maintenance mechanic, Harry Burdett, and, if there is an issue with such an order, Ms. Rainey will have him contact the vender and deal with those issues himself.

Most of Ms. Rainey's duties involve tasks that occur *after* the production process is completed and/or after the materials are shipped out to customers. Her primary role is to gather

information relating to personnel, production, and billing and forward that on to the Employer's corporate office. Based on the foregoing, I find that the evidence establishes that Ms. Rainey works more as an office clerical than as a plant clerical. As a result, I find that the Petitioner has met its burden of proof.

The Employer contends Ms. Rainey's work in the Office is a temporary assignment and there is an obvious expectancy that she will return to her permanent position as a laboratory technician / load out person, and, under Board law, her permanent position is what should be considered in determining her eligibility. I do not find Ms. Rainey's position in the Office to be a temporary assignment or that it is obvious that she will return to working full-time in the laboratory. Ms. McLain's employment ended in late April 2011. Since then, Ms. Rainey has worked full-time in the Office, performing the tasks described above. The Employer has not placed an advertisement or interviewed anyone to fill Ms. Rainey's position in the Office, and there is no evidence that the Employer is attempting to transition Ms. Rainey back into working primarily in the laboratory. While Ms. Rainey has worked five or six shifts in the laboratory between late April and late August 2011, she was filling in because the laboratory was short staffed or the work was too much for scheduled staff to handle without assistance. Based upon the evidence, Ms. Rainey's primary job has been to work in the Office, and the record suggests that she will remain working in the Office, performing the same functions she has been performing for the last five months.

THE OBJECTIONS

The Employer has raised three separate Objections. First, the Employer contends that Barrett Oliver, as a statutory supervisor, coerced eligible voters into supporting Petitioner and/or interfered with eligible voters' freedom of choice by: (1) making and posting repeated statements

in support of the union; (2) telling, and posting literature which stated, to employees that they needed a union and promising employees benefits if they voted for the union; (3) predicting that he and the union would be "running this place" as soon as the union won the election; (4) acting as an observer for the Petitioner at the election; (5) using his position to threaten voters' job security; and (6) engaging in other coercive conduct and conduct that tended to interfere with employees' ability to exercise a free and reasoned choice in the election. Second, the Employer contends that Petitioner coerced eligible voters and otherwise destroyed the "laboratory conditions" necessary for a fair election by electioneering in the voting area by having a statutory supervisor, Oliver, wear insignia of Petitioner while acting as Petitioner's election observer. Third, the Employer contends that Petitioner coerced eligible voters and otherwise destroyed the "laboratory conditions" necessary for a fair election by, during the voting period, electioneering in the voting area and creating the impression of surveillance in the voting area by displaying large yard signs supporting Petitioner at a private residence directly across the street from the polling place.

As the objecting party, the Employer has the burden of proof with regard to the objections. *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005); *Antioch Rock & Ready Mix*, 327 NLRB 1091, 1092 (1999). Because there is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of employees, the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one. *Delta Brands*, 344 NLRB at 253 (citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989)); *Antioch Rock*, 327 NLRB at 1092. The objecting party must show, inter alia, that the conduct in question affected employees in the voting unit and had a reasonable tendency to affect the outcome of the election. *Delta Brands*, 344 NLRB at 253 (citations omitted). The objecting party must also establish

dissemination of statements allegedly interfering with preelection conditions; dissemination will not be presumed. *Antioch Rock*, 327 NLRB at 1092 (citing *Kohomo Tube Co.*, 280 NLRB 357, 358 including fn. 9 (1986)).

Objection 1

The Employer contends that Barrett Oliver, as a statutory supervisor, engaged in objectionable conduct by: (1) making and posting repeated statements in support of the union; (2) telling, and posting literature which stated, to employees that they needed a union and promising employees benefits if they voted for the union; (3) predicting that he and the union would be "running this place" as soon as the union won the election;[14] (4) acting as an observer for the Petitioner at the election; (5) using his position to threaten voters' job security; and (6) engaging in other coercive conduct and conduct that tended to interfere with employees' ability to exercise a free and reasoned choice in the election.[15] I will address each of these in turn.

There is no dispute that there were various postings put up around the Employer's facility containing pro-union messages and information. One posting stated that voting yes to a union would result in fair and equal treatment, better wages and benefits, better training and safety conditions, and voice against management. The other postings provided information responding to questions, such as whether employees would lose money by joining a union, whether employees could vote for the union with the idea of trying it out for a year, what happens during the one year period of negotiation, and whether union membership in general, and membership

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[14] The Employer presented no evidence at the hearing establishing that Oliver predicted that he and the union would be "running this place" as soon as the Union won the election. As a result, I overrule the objection for lack of evidence.

[15] To be clear, based upon the wording of the Objection, and the evidence introduced at the hearing, the Employer's contention regarding this conduct rests on its contention that Oliver is a Section 2(11) supervisor. In other words, the Employer is not contending that the statements and conduct themselves are objectionable. It is the fact that they were said or done by a purported statutory supervisor. The Employer has made no argument and cited no authority as to how these statements or conduct would be objectionable if made or done by a non-supervisory employee.

with the Petitioner, has been declining. There is no evidence as to exactly when these postings went up, but they were promptly taken down by the Employer.

The Employer's argument appears to be that because Oliver was involved in putting these postings up, and he was a statutory supervisor, the postings and his role in putting them up is objectionable conduct. One witness, Rebecca Campobello, testified that she witnessed Oliver put up a posting relating to unions (but she could not recall what the posting said). She asked Oliver to take it down, and Oliver refused. There is no other evidence linking Oliver to the postings.

Assuming that Oliver was responsible for putting up the postings at issue, the only argument for why it is objectionable is the contention that he is a statutory supervisor. As previously stated, I have found the Employer has not met its burden of establishing that Oliver is a Section 2(11) supervisor. As such, I find no merit to this objection.

Similarly, there is evidence in the record that Oliver spoke to employees about unions and why he supported the Petitioner. The Employer cites to the testimony of a few witnesses regarding conversations each had with Oliver regarding the Union. The Employer cited to Rebecca Campobello, who recalled that Oliver stated to her and others: "you know, we should all vote union. If we don't vote union, we are all going to be sorry that we don't vote union. We are never going to get more money if we don't go the -- if we don't vote the union. The union is going to do so much for us, that we should look into it. He also stated that -- now that it's went this far, that if we don't vote for union, there's a good possibility that we probably all lose our jobs." After he said this, Campobello recalled that a conversation ensued with all of the employees (including Oliver) present in which they expressed their views. Oliver later asked Campobello if she wanted to sign an authorization card, and she told him no, because she had not made up her mind yet.

The Employer also cites to the testimony of Bob St. Clair, who testified that: "Barrett talked to me about voting for the union, and what the benefits would be .... and Barrett would talk about how the union was going to be a benefit to come in there."

Finally, the Employer cites to the testimony of Ethan Kogutkiewicz, who testified that Oliver asked him on around April 12, 2011 if he knew anything about Local 139. Kogutkiewicz said he did not. Oliver told Kogutkiewicz that he "should look into it, there was good benefits, good -- they would raise our pay significantly."

The Employer contends that because of Oliver's status as a statutory supervisor, these statements constitute objectionable threats and promises. However, because I find that the Employer has not met its burden of establishing that Oliver is statutory supervisor, I find no merit to this objection.[16]

Finally, the Employer contends that at various points during his employment with the Employer Oliver secretly tape-recorded conversations with managers and other employees. The Employer contends that this conduct, by a supervisor, precluded employees from making a free and reasoned choice at the time of the election. The Employer cites to no authority holding that recording conversations in a context free of objectionable or unlawful conduct amounts to objectionable conduct, and I have found none, particularly when, as is the case here, the evidence does not establish that Oliver is statutory supervisor. As such, I find no merit to this argument.

Objection 2

The Employer next contends that the Union's use of Oliver as its observer constitutes objectionable conduct because persons closely identified with management may not act as

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[16] The Employer, throughout its post-hearing Brief, refers to Oliver as someone closely aligned with management. However, the Employer's sole argument is that Oliver is a Section 2(11) supervisor. As a result, based upon the stated objection, I find no merit.

election observers. The Employer's sole legal support for this proposition is *Family Services Agency, San Francisco*, 331 NLRB 850 (2000). In *Family Services Agency*, the Board held that either party's use of a *statutory supervisor* as an election observer constitutes objectionable conduct. As previously stated, I do not find that Oliver is a Section 2(11) supervisor. As a result, I find no merit to the stated objection.

The Employer further contends that Oliver's wearing of a shirt with the "Local 139" logo on it and a hat with the "Local 139" logo on it while acting as the Petitioner's observer is objectionable conduct. Although the Board discourages observers from wearing campaign insignia during the polling session, it does not prohibit that conduct. See *U-Haul Co. of Nevada, Inc.*, 341 NLRB 195, 196 (2004); See also *Western Electric Co.*, 87 NLRB 183, 184-185 (1949) (as the identity of election observers, as well as the fact that they represent the special interests of the parties, is generally known to employees, we do not believe that the fact that the [union] button was worn by an observer prejudiced the result of the election); *Electric Wheel Co.*, 120 NLRB 1644, 1647 (1958) (wearing of union button by election observer "did not constitute interference with employee freedom of choice"). Without more, the Board does not set aside elections based on the fact that an election observer wore some type of partisan insignia during the polling period. *Van Leer Containers, Inc. v. NLRB*, 841 F.2d 779, 788 (7th Cir. 1988) and the cases cited there. In the absence of any other improper conduct by Oliver during the course of the election, I find the evidence is insufficient to sustain this objection.

Objection 3

The Employer's final objection is that the Union created an impression of surveillance and electioneering by posting two large signs across the street from the polling place, on private property, the day before the election. The Union's business representative, Al Fogel, put up the

signs on private farm land across the street from the Employer's facility the day before the election, and he took them down the day after the election. The two signs measured about 4 feet by 8 feet and read: "The Community Supports Local 139" and "Vote Yes." The signs were in the Union's colors of black and yellow. Fogel put the signs up with the assistance of a former employee of the Employer, Bart Billings, and Fogel took them down with the assistance of another Union representative, Mark Gauf.

The election occurred in the Employer's Office. There is no dispute that the signs were up prior to and during the polling period. However, the window in the Office facing the signs was covered, and none of the witnesses who testified stated that they could see the signs from the polling place in the Office.[17]

The Employer contends the Union created the impression of surveillance by having individuals standing by the signs at or around the time of the election. In reviewing the testimony, the witnesses had conflicting recollections as to the signs and whether there was anyone around them during the polling period. Wayne Daily testified that there were two or three people standing by the sign prior to the election. Harry Burdett, the Employer's observer, testified that no one was by the sign when he went to vote. Rebecca Campobello testified that she saw three people in the vicinity of the sign in the mid-morning on the day of the election. [The election began at around 5:30 pm to 6:30 pm.] Bob St. Clair testified that he did not see anyone standing by the sign. Kogutkiewicz testified that he did not see any signs at the time of the election. Oliver testified that he did not see anyone by the sign. Based upon this conflict in

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[17] Each of the witnesses who testified about the signs had different recollections. Dailey testified the sign said "the community supports Local 139, something to that effect." Burdett testified that the signs said, "Vote Yes" or "Vote for the Union," Campobello testified that the sign said, "vote yes on something union – I don't know exactly what it said." St. Clair testified that the sign said, "backed by the community" and "Vote Union." Kogutkiewicz testified that he did not see any signs.

testimony, I conclude there is insufficient evidence to establish that there was anyone from the Union by the signs at or around the time of the election. I further conclude that even if there were individuals from the Union by the signs at the time of the election, the record establishes that those individuals by the signs would not have been able to see the voters as they entered the polling place or as they voted. As a result, I do not find that the Union created the impression of surveillance.

The Employer contends in its brief that the signs are objectionable because they constitute electioneering. The Board prohibits employers and unions from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election. *Peerless Plywood Co.*, 107 NLRB 427 (1953); see also *Pearson Education, Inc.*, 336 NLRB 979 (2001), enfd. 373 F.3d 127 (D.C. Cir. 2004), cert. denied 543 U.S. 1131 (2005). The Employer cites no authority as to how the signs at issue, which were located on private property across the street from the Employer's facility, and were not visible to voters while they voted, constituted objectionable electioneering. Consequently, under the circumstances, I do not find the posting of these signs to be objectionable.[18]

The Employer also argues that Bart Billings, Travis Fries, and Mark Gauf were standing in the parking lot watching employees enter and exit the polling place, which created the impression of surveillance. Billings is a former employee and Fries is a current employee. Gauf

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[18] The Employer contends that in the months leading up to the election, there were a number of complaints made by area residents against the Employer because of the noise and damage being caused by the Employer's loaders and the delivery trucks coming in and out of the facility. These complaints were raised at town meetings. The Employer argues that there was concern among employees that if the Union were elected it would somehow work to restrict the times and hours the employees worked, thereby reducing the employees' hours and, as a result, their total pay. The Employer contends that the signs stating that the community supports the Petitioner could have reinforced this fear and thereby reasonably could have tainted the laboratory conditions. I do not agree. I do not view this sign as reasonably having any tendency to interfere with an employee's free choice as it is nothing more than permissible propaganda recognizable for what it is. *Midland National Life*, 263 NLRB 127 (1982).

is a Union business agent. The only witness who observed this was Bob St. Clair, who testified, on direct examination, as follows:

> Q: Now on the day that you voted, what did you notice as you – can you tell us your observations as you entered the voting area?
> A: When I went into the voting area I noticed my – Bart Billings was out in the parking lot with Travis – I can't remember Travis' last name – he works there also – and Jeff and Mark, were in the parking lot.

On cross-examination, St. Clair testified as follows:

> Q: Okay. The morning of the election – or the day of the election, my apologies, you said when you went into vote that day you saw out in the parking lot, and correct me if I'm wrong, Barrett Oliver, Travis, Mark, and Billings, is that correct?
> A: Barrett was not out in the parking lot.
> Q: Okay. Bart. I'm sorry.
> A: Bart.
> Q: Bart. Bart, Billings, Travis, and Mark.
> A: Bart Billings –
> Q: Bart Billings.
> A – Travis, and Mark. Those three for sure.
> Q: Did you talk – did they talk to you?
> A: Umm, when I was getting back in my vehicle Travis told me I had a back up light out.
> Q: But they didn't talk to you before you went to vote.
> A: No.
> Q: And they didn't talk to you after – were they still there when you left the vote?
> A: Yes.
> Q: They didn't say anything to you.
> A: No.

The Employer argues that by the above, the Petitioner created the impression of surveillance, presumably because Mark Gauf was among the employees. I find the record evidence regarding this allegation is slim. It consists solely of St. Clair's uncorroborated testimony about his passing observation as he went in to vote. There is no evidence as to exactly how far Gauf and the others were from the polling place, what they were doing at the time, or even if these individuals were looking in the direction of the polling place at the time St. Clair went into vote. There is no evidence that they were recording, taking notes or doing anything to

document who was voting. The Employer cites to no authority as to how, under these circumstances, the presence of Mark Gauf in the parking lot alone created an impression of surveillance. As St. Clair acknowledges, no one in the group said anything to him before he went to vote or after he went to vote, other than that his tail light was out. I find that this isolated, undeveloped testimony is insufficient to warrant sustaining the objection.

CONCLUSION & RECOMMENDATION

As stated above, with regards to the challenged ballots, the party claiming an individual is ineligible has the burden of proof, and the burden cannot be met with incomplete, generalized or conclusory evidence. Based upon this, I find and conclude that the Petitioner has failed to meet its burden of establishing that during the critical period Mr. Rainey possessed any primary indicia of supervisory authority that was not of a merely routine or clerical nature, and which required the use of independent judgment. I find and conclude the same regarding the Employer's burden regarding Barrett Oliver. Both the Petitioner and the Employer relied on generalized or conclusory testimony to meet their respective burdens, and such testimony is insufficient. I, therefore, recommend that the challenges to Todd Rainey and Barrett Oliver be overruled and that their ballots be opened and counted. As for Ralea Rainey, I find the Petitioner has met its burden of establishing that she is an office clerical employee. I, therefore, recommend that the challenge to Ralea Rainey be sustained. I recommend that all three of the Employer's Objections be overruled. For the reasons stated above, the Employer has failed to meet its burden regarding those Objections. [19]

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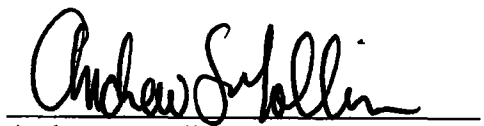
[19]Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report must be received by the Board in Washington, DC by November 25, 2011. Immediately upon the filing of exceptions, the party filing same shall serve a copy with the Regional Director of the Thirtieth Region. If no exceptions are filed, the Board will adopt the recommendation of the Hearing Officer.

Signed at Milwaukee, Wisconsin on November 3, 2011.



Andrew S. Gollin, Hearing Officer
National Labor Relations Board
Thirtieth Region
310 West Wisconsin Avenue, Suite 700W
Milwaukee, WI 53203

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlrb.gov. On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

Proppant Specialists, LLC
Case 30-RC-6783

Copies of Hearing Officer's Report on Challenged Ballots and Objections to Conduct Affecting the Results of the Election with Findings and Recommendations have been sent on November 3, 2011, by certified mail and regular mail, to the following parties of record:

CERTIFIED MAIL AND REGULAR MAIL

Gregory H. Andrews, Esq.
Jackson Lewis, LLP
150 North Michigan Avenue, Suite 2500
Chicago, IL 60601

Charles W. Pautsch, Esq.
Jackson Lewis, LLP
330 E. Kilbourn Avenue, Suite 565
Milwaukee, WI 53202-3144

Pasquale A. Fioretto, Esq.
Baum Sigman Auerbach & Neuman, Ltd.
200 W. Adams Street, Suite 2200
Chicago, IL 60606-5231

REGULAR MAIL

Wayne Dailey, Manager
Proppant Specialists, LLC
12451 Franklin Road
Tomah, WI 54660-7562

Pasquale Fioretto, Esq.
Baum Sigman Auerbach & Neuman, Ltd.
Int'l Union of Operating Engineers
P.O. Box 130
Pewaukee, WI 53072-0130

Lester Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, NW
Washington, D.C. 20570

NOT TO BE INCLUDED IN
BOUND VOLUMES

PFB
Tomah, WI

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PROPPANT SPECIALISTS, LLC
Employer

and

Case 30-RC-006783

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 139, AFL-CIO
Petitioner

DECISION AND DIRECTION

The National Labor Relations Board, by a three-member panel, has considered determinative challenged ballots and objections to an election held June 9, 2011, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 8 votes for the Petitioner, 7 against, and 4 challenged ballots, a number sufficient to affect the election's results.

Having reviewed the record in light of the exceptions and briefs, the Board adopts the hearing officer's findings and recommendations.[1]

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[1] There were no exceptions to the hearing officer's recommendation to overrule the challenge to Todd Rainey's ballot.

In adopting the hearing officer's finding that Barrett Oliver is not a statutory supervisor, we rely only on his finding that the Employer failed to establish that Oliver exercises independent judgment in assigning or responsibly directing employees. We also find that the Employer failed to show that Oliver is closely associated with management. *BP Custom Building Products*, 251 NLRB 1337 (1980), upon which the Employer principally relies in this regard, is distinguishable. There, the Board found that employee Hoss was an agent of the employer and, on that basis, that his service as the employer's election observer was

EXHIBIT C

DIRECTION

IT IS DIRECTED that the Regional Director for Region 30 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Barrett Oliver and Todd Rainey, and prepare and serve on the parties a revised tally of ballots. If, at that point, the still-unresolved challenge to the ballot of Burdette Billings is nondeterminative, the Regional Director shall issue the appropriate certification. Otherwise, the Regional Director shall take further appropriate action.

Dated, Washington, D.C., April 3, 2012.

Mark Gaston Pearce, Chairman

Terence F. Flynn, Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

---

objectionable. Other than to claim that Oliver is a statutory supervisor, a claim that we have rejected, the Employer does not contend that Oliver is its agent. To the extent that it implies such a contention by claiming that Oliver, like Hoss, was placed in a position in which he would be viewed as speaking on management's behalf, we reject that claim as well. Hoss attended management meetings, spoke on behalf of management at employee meetings, and promised employees benefits on behalf of the employer. There is no evidence that Oliver does likewise. Having found that Oliver is not closely associated with management, we find it unnecessary to address the Employer's legal argument that persons closely associated with management may not serve as election observers for a union.

In adopting the hearing officer's finding that Ralea Rainey is an office clerical employee excluded from the unit under the terms of the parties' stipulation, we do not rely on any post-election evidence cited by the hearing officer.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 30

PROPPANT SPECIALISTS, LLC Employer and INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 139, AFL-CIO Petitioner	**Case 30-RC-006783**

TYPE OF ELECTION: RD DIRECTED

CERTIFICATION OF REPRESENTATIVE

An election has been conducted under the Board's Rules and Regulations. The SECOND REVISED Tally of Ballots shows that a collective-bargaining representative has been selected. No timely objections have been filed.

As authorized by the National Labor Relations Board, it is certified that a majority of the valid ballots have been cast for

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 139, AFL-CIO

and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit.

Unit: All full-time and regular part-time equipment operators, lab techs, and mechanics employed by the Employer at its Tomah, Wisconsin facility; excluding all managerial employees, office clericals, guards and supervisors as defined in the Act.

April 19, 2012

BENJAMIN MANDELMAN
Acting Regional Director, Region 30
National Labor Relations Board

EXHIBIT D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

PROPPANT SPECIALISTS, LLC

Case 30-CA-082116

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, AFL-CIO

COMPLAINT

This Complaint, which is based on a charge filed by the International Union of Operating Engineers, Local 139, AFL-CIO (Union), is issued pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. §151 et seq. (Act), and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (Board), and alleges that Proppant Specialists, LLC (Respondent) has violated the Act by engaging in the following unfair labor practices:

1. The original charge in this proceeding was filed by the Union on May 31, 2012, and a copy was served by regular mail on Respondent on the same date.

2. (a) At all material times, Respondent, a limited liability corporation, with its headquarters in Brady, Texas, has been engaged in the business of manufacturing and delivering industrial sands from its Tomah, Wisconsin facility.

(b) During the past calendar year, Respondent, in conducting its operations described above in subparagraph 2(a), sold and shipped goods and materials valued in excess of $50,000 directly to customers located outside of the State of Wisconsin.

EXHIBIT E

(c) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

4. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and/or agents of Respondent within the meaning of Section 2(13) of the Act:

Marc Rowland - CEO

Glen Garity - Acting Plant Manager

5. (a) The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time equipment operators, lab techs, and mechanics employed by the Employer at its Tomah, Wisconsin facility, but excluding all managerial employees, office clericals, guards, and supervisors as defined in the Act.

(b) On June 9, 2011, a representation election by secret ballot was conducted among the employees in the Unit, and, on April 19, 2012, the Union was certified as the exclusive collective bargaining representative of the Unit.

(c) At all material times based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the Unit.

6. (a) On about April 25, 2012, May 8, 2012, and May 22, 2012, the Union, , by

letter, requested that Respondent recognize it as the exclusive collective bargaining representative of the Unit and bargain collectively with the Union as the exclusive collective bargaining representative of the Unit. Copies of these letters are attached as Exhibits 1(a)(1), 1(a)(2), 1(b)(1), 1(b)(2) and 1(c).

(b) Since about May 29, 2012, the Respondent, by letter, has declined to bargain with the Union and has failed and refused to recognize and bargain with the Union as the exclusive collective bargaining representative of the Unit. A copy of this letter is attached as Exhibit 2.

7. (a) On about April 25, 2012, May 8, 2012, and May 22, 2012, the Union requested, by letter, that Respondent furnish the Union with the names, addresses and telephone numbers of employees in the Unit. Copies of these letters are attached as Exhibits 3(a)(1), 3(a)(2), 3(b)(1), 3(b)(2), and 3(c).

(b) The information requested by the Union, as described above in paragraph (a) is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective bargaining representative of the Unit.

(c) Since about May 29, 2012, Respondent, in writing, has failed and refused to furnish the Union with the information requested by it as described above in paragraph (a). See attached Exhibit 2.

8. By the conduct described above in paragraphs 6 and 7, and their subparagraphs, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective bargaining representative of its employees in violation of Sections 8(a)(1) and (5).

9. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

10. (a) Respondent's purpose in refusing to bargain is to test the certification the Board issued in Case 30-RC-006783.

(b) As part of the remedy for Respondent's unfair labor practices alleged above in paragraphs 6 and 7, and their subparagraphs, the General Counsel seeks:

(i) An Order requiring Respondent to bargain in good faith with the Union, on request, as the recognized bargaining representative in the appropriate unit;

(ii) An Order extending the certification year as required by *Mar-Jac Poultry*, 136 NLRB 785 (1962) and that such extension be based on the date upon which Respondent begins to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit;

(iii) All other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the Complaint. The answer must be received by this office on or before **July 10, 2012, or postmarked on or before July 9, 2012.** Unless filed electronically in a pdf format, Respondent should file an original and four copies of the answer with this office.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **File Case Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of

the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the Complaint are true.

Dated: June 26, 2012

Irving E. Gottschalk, Regional Director
National Labor Relations Board
Thirtieth Region
310 West Wisconsin Avenue, Suite 700W
Milwaukee, WI 53203

International Union of Operating Engineers

LOCAL ONE HUNDRED AND THIRTY-NINE
CHARTERED FOR THE STATE OF WISCONSIN
N27 W23233 ROUNDY DRIVE P.O. BOX 130 PEWAUKEE, WISCONSIN 53072
PHONE: (262) 896-0139 FAX (262) 896-0758

TERRANCE E. McGOWAN
Business Manager

April 25, 2012

RRR-CERTIFIED (also sent via regular mail)
Return Receipt # 7010 2780 0002 4249 8817

Mr. Glen Garity
Proppant Specialists, LLC
12451 Franklin Road
Tomah, WI 54660

Re: Demand for Collective Bargaining

Dear Mr. Garity:

As you are aware, the National Labor Relations Board certified the results of the election on April 19, 2012. This will advise you that the International Union of Operating Engineers, Local No. 139 is demanding to begin collective bargaining over the wages, hours and terms and conditions of employment of all bargaining unit employees in the bargaining unit certified by the National Labor Relations Board.

Please contact me at (608) 243-0139 or 4702 S. Biltmore Lane, Madison, WI 53718, within seven (7) days of the date of this letter, and provide us with the dates and location(s) that you are available to meet. Please be advised that we would be available on the following dates to begin our negotiations: Tuesday, May 1, 2012; Tuesday, May 8, 2012; Thursday, May 10, 2012; and Friday, May 11, 2012. We would suggest a starting time of 10:00 a.m. We would also suggest alternating locations of the bargaining sessions with our respective offices. Initially, I would offer the Union's Madison office.

EXHIBIT 1(a)

I look forward to getting the bargaining sessions under way. Please contact me at your earliest convenience so we can get started and confirm some of the details.

Sincerely,

Al Fogel

Allan Fogel

cc: Terrance E. McGowan (via e-mail)
Ryan Oehlhof (via e-mail)
Mark Gauf (via e-mail)
Baum Sigman - Legal Counsel (via e-mail)

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International Union of Operating Engineers

LOCAL ONE HUNDRED AND THIRTY-NINE
CHARTERED FOR THE STATE OF WISCONSIN
N27 W23233 ROUNDY DRIVE P.O. BOX 130 PEWAUKEE, WISCONSIN 53072
PHONE: (262) 896-0139 FAX (262) 896-0758

TERRANCE E. McGOWAN
Business Manager

April 25, 2012

RRR-CERTIFIED (also sent via regular mail)
Return Receipt # 7010 2780 0002 4249 8824

Mr. Marc Rowland, CEO
Proppant Specialists, LLC
2003 Nine Road
Brady, TX 76825-7209

Re: Demand for Collective Bargaining

Dear Mr. Rowland:

As you are aware, the National Labor Relations Board certified the results of the election on April 19, 2012. This will advise you that the International Union of Operating Engineers, Local No. 139 is demanding to begin collective bargaining over the wages, hours and terms and conditions of employment of all bargaining unit employees in the bargaining unit certified by the National Labor Relations Board.

Please contact me at (608) 243-0139 or 4702 S. Biltmore Lane, Madison, WI 53718, within seven (7) days of the date of this letter, and provide us with the dates and location(s) that you are available to meet. Please be advised that we would be available on the following dates to begin our negotiations: Tuesday, May 1, 2012; Tuesday, May 8, 2012; Thursday, May 10, 2012; and Friday, May 11, 2012. We would suggest a starting time of 10:00 a.m. We would also suggest alternating locations of the bargaining sessions with our respective offices. Initially, I would offer the Union's Madison office.

I look forward to getting the bargaining sessions under way. Please contact me at your earliest convenience so we can get started and confirm some of the details.

Sincerely,

Al Fogel

Allan Fogel

cc: Terrance E. McGowan (via e-mail)
Ryan Oehlhof (via e-mail)
Mark Gauf (via e-mail)
Baum Sigman - Legal Counsel (via e-mail)

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International Union of Operating Engineers
LOCAL ONE HUNDRED AND THIRTY-NINE
CHARTERED FOR THE STATE OF WISCONSIN
N27 W23233 ROUNDY DRIVE P.O. BOX 130 PEWAUKEE, WISCONSIN 53072
PHONE: (262) 896-0139 FAX (262) 896-0758

TERRANCE E. McGOWAN
Business Manager

May 8, 2012

RRR-CERTIFIED (also sent via regular mail)
Return Receipt # 7010 2780 0002 4249 8862

Mr. Glen Garity
Proppant Specialists, LLC
12491 Franklin Road
Tomah, WI 54660

Re: Demand for Collective Bargaining

Dear Mr. Garity:

Since our last letter dated April 25, 2012, we have not received a response from you. As you are aware, the National Labor Relations Board certified the results of the election on April 19, 2012. This will advise you that the International Union of Operating Engineers, Local No. 139 is demanding to begin collective bargaining over the wages, hours and terms and conditions of employment of all bargaining unit employees in the bargaining unit certified by the National Labor Relations Board.

Please contact me at (608) 243-0139 or 4702 S. Biltmore Lane, Madison, WI 53718, within seven (7) days of the date of this letter, and provide us with the dates and location(s) that you are available to meet. Please be advised that we would be available on the following dates to begin our negotiations: Tuesday, May 22, 2012; Wednesday, May 23, 2012; Thursday, May 24, 2012; Tuesday, May 29, 2012; Wednesday, May 30, 2012; and/or Thursday, May 31, 2012. We would suggest a starting time of 10:00 a.m. We would also suggest alternating locations of the bargaining sessions with our respective offices. Initially, I would offer the Union's Madison office.

EXHIBIT 1(b)(1)

I look forward to getting the bargaining sessions under way. Please contact me at your earliest convenience so we can get started and confirm some of the details.

Sincerely,

Al Fogel

Allan Fogel

cc: Terrance E. McGowan (via e-mail)
Ryan Oehlhof (via e-mail)
Mark Gauf (via e-mail)
Baum Sigman - Legal Counsel (via e-mail)

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International Union of Operating Engineers

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PHONE: (262) 896-0139 FAX (262) 896-0758

TERRANCE E. McGOWAN
Business Manager

May 8, 2012

RRR-CERTIFIED (also sent via regular mail)
Return Receipt # 7010 2780 0002 4249 8855

Mr. Marc Rowland
Proppant Specialists, LLC
2003 Nine Road
Brady, TX 76825

Re: Demand for Collective Bargaining

Dear Mr. Rowland:

Since our last letter dated April 25, 2012, we have not received a response from you. As you are aware, the National Labor Relations Board certified the results of the election on April 19, 2012. This will advise you that the International Union of Operating Engineers, Local No. 139 is demanding to begin collective bargaining over the wages, hours and terms and conditions of employment of all bargaining unit employees in the bargaining unit certified by the National Labor Relations Board.

Please contact me at (608) 243-0139 or 4702 S. Biltmore Lane, Madison, WI 53718, within seven (7) days of the date of this letter, and provide us with the dates and location(s) that you are available to meet. Please be advised that we would be available on the following dates to begin our negotiations: Tuesday, May 22, 2012; Wednesday, May 23, 2012; Thursday, May 24, 2012; Tuesday, May 29, 2012; Wednesday, May 30, 2012; and/or Thursday, May 31, 2012. We would suggest a starting time of 10:00 a.m. We would also suggest alternating locations of the bargaining sessions with our respective offices. Initially, I would offer the Union's Madison office.

EXHIBIT 1(b)(2)

I look forward to getting the bargaining sessions under way. Please contact me at your earliest convenience so we can get started and confirm some of the details.

Sincerely,

Al Fogel

Allan Fogel

cc: Terrance E. McGowan (via e-mail)
Ryan Oehlhof (via e-mail)
Mark Gauf (via e-mail)
Baum Sigman - Legal Counsel (via e-mail)

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BAUM SIGMAN AUERBACH & NEUMAN, LTD.
Attorneys and Counsellors

200 West Adams Street, Suite 2200
Chicago, IL 60606-5231
312.236.4316
312.236.0241 (Fax)

N27 W23233 Roundy Drive
Pewaukee, WI 53072

Pasquale A. Fioretto
Admitted in IL and WI

E-mail Address:
pfioretto@baumsigman.com

May 22, 2012

VIA E-MAIL
gregory.andrews@jacksonlewis.com
Mr. Gregory H. Andrews
Jackson Lewis, LLP
130 North Michigan Avenue, Suite 2500
Chicago, IL 60601

VIA E-MAIL
cwpautsch@jacksonlewis.com
Mr. Charles W. Pautsch
Jackson Lewis, LLP
330 E. Kilbourn Avenue, Suite 565
Milwaukee, WI 53202

Re: IUOE, Local 139 (Proppant Specialists, LLC)
Case Number: 30-RC-6783
Our File Number: 23268

Dear Mr. Andrews and Mr. Pautsch:

As you are aware, the undersigned represents the Petitioner, the International Union of Operating Engineers, Local 139. It is my understanding that your firm still represents Proppant Specialists, LLC ("Proppant"). If this is not accurate, please notify me immediately.

As you also might be aware, on April 19, 2012, the National Labor Relations Board certified the results of the election. Attached is a copy of the Board's April 19, 2012 Certification of Representative. Consequently, on April 25, 2012 and again on May 8, 2012, Local 139 sent Proppant written demands to commence bargaining and offering a wide range of possible dates upon which to meet. Additionally, as the certified bargaining representative, the Union also sent separate letters requesting information on the current bargaining members (i.e., names, addresses and telephone numbers). Copies of these letters are attached. To date, Proppant has failed to respond and/or acknowledge the Union's requests.

As you know, upon request, Proppant is required to begin collective bargaining over the wages, hours and terms and conditions of employment of all the bargaining unit employees in the bargaining unit certified by the National Labor Relations Board. Failure to do so is a violation of the National Labor Relations Act. Further, as the certified bargaining representative and in order to prepare for its responsibilities to bargain over a collective bargaining agreement, the Union requested limited information on the composition of the current bargaining unit. Once again, it is well settled that an employer, upon request, must provide a union with information that is relevant to carrying out its statutory duties and responsibilities in representing employees. This duty to provide information includes information relevant to negotiations and contract administration. Failure to comply also can lead to a separate violation of the National Labor Relations Act.

EXHIBIT 1(c)

Local 139, for a third time, is demanding that the parties commence bargaining and that Proppant provide the Union with the information requested. Absent an appropriate response, Local 139 has authorized me to explore any and all legal options available to seek compliance, including, but not limited to, seeking recourse from the Labor Board.

Accordingly, unless Local 139 or the undersigned is contacted within the next seven (7) days and a bargaining session is scheduled (and the information request is produced), Local 139 will explore filing an unfair labor practice charge with Region 30.

Your immediate attention is requested.

Sincerely,

BAUM SIGMAN AUERBACH & NEUMAN, LTD.

Pasquale A. Fioretto / ww

Pasquale A. Fioretto

PAF/ww
Enclosures
(original sent regular mail)
cc: Terrance E. McGowan (via e-mail)
Ryan Oehlhof (via e-mail)
Al Fogel (via e-mail)
Mark Gauf (via e-mail)
Deborah Farrell
I:\139\Proppant Specialist\andrews pautsch 05.22.12 paf.ww.wpd

33268

jackson | lewis
Attorneys at Law

Representing Management Exclusively Workplace Law and Related Litigation

Jackson Lewis LLP
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ALBUQUERQUE, NM	GREENVILLE, SC	MORRISTOWN, NJ	PROVIDENCE, RI
ATLANTA, GA	HARTFORD, CT	NEW ORLEANS, LA	RALEIGH-DURHAM, NC
AUSTIN, TX	HOUSTON, TX	NEW YORK, NY	RICHMOND, VA
BALTIMORE, MD	INDIANAPOLIS, IN	NORFOLK, VA	SACRAMENTO, CA
BIRMINGHAM, AL	JACKSONVILLE, FL	OMAHA, NE	SAINT LOUIS, MO
BOSTON, MA	LAS VEGAS, NV	ORANGE COUNTY, CA	SAN DIEGO, CA
CHICAGO, IL	LONG ISLAND, NY	ORLANDO, FL	SAN FRANCISCO, CA
CINCINNATI, OH	LOS ANGELES, CA	PHILADELPHIA, PA	SEATTLE, WA
CLEVELAND, OH	MEMPHIS, TN	PHOENIX, AZ	STAMFORD, CT
DALLAS, TX	MIAMI, FL	PITTSBURGH, PA	WASHINGTON, DC REGION
DENVER, CO	MILWAUKEE, WI	PORTLAND, OR	WHITE PLAINS, NY

MY DIRECT DIAL IS: (312) 803-2504
MY EMAIL ADDRESS IS: GREGORY.ANDREWS@JACKSONLEWIS.COM

May 29, 2012

RECEIVED
MAY 31 2012
Baum Sigman

VIA CERTIFIED U.S. MAIL

Pasquale Fioretto, Esq.
Baum Sigman Auerbach & Neuman, Ltd.
200 West Adams Street, Suite 2200
Chicago, IL 60606

Re: Proppant Specialists, LLC and International Union of Operating Engineers Local 139, AFL-CIO; Case No. 30-RC-6783

Dear Mr. Fioretto:

Please be advised we are in receipt of your correspondence of May 22, 2012 inviting Proppant to commence bargaining with Local 139. Proppant declines to bargain at this time. Further, it will not be necessary for Local 139's Business Agents to continue visiting Proppant's Tomah, Wisconsin facility, as Proppant intends to challenge the Board's April 19, 2012 Certification of Representation.

Additionally, please note Mr. Pautch is no longer with Jackson Lewis LLP. Please direct all future communications regarding this matter to my attention exclusively.

Very truly yours,
JACKSON LEWIS LLP

Gregory H. Andrews

GHA/sjg

cc: Sarah J. Gasperini (via email)

EXHIBIT 2

International Union of Operating Engineers

LOCAL ONE HUNDRED AND THIRTY-NINE
CHARTERED FOR THE STATE OF WISCONSIN
N27 W23233 ROUNDY DRIVE P.O. BOX 130 PEWAUKEE, WISCONSIN 53072
PHONE: (262) 896-0139 FAX (262) 896-0758

TERRANCE E. McGOWAN
Business Manager

April 25, 2012

Mr. Glen Garity
Proppant Specialists, LLC
12451 Franklin Road
Tomah, WI 54660

Re: Request for Information

Dear Mr. Garity:

As you are aware, the National Labor Relations Board certified the results of election on April 19, 2012. This will advise you that the International Union of Operating Engineers, Local No. 139 is requesting the names, addresses, and telephone numbers of all full time and regular part equipment operators, lab techs, and mechanics employed by the Employer at its 12451 Franklin Road Tomah, Wisconsin 54660 facility; excluding all managerial employees, office clericals, guards, and supervisors as defined in the act.

Please contact me at 608-243-0139 or 4702 S. Biltmore Lane Madison, Wisconsin 53718, within seven (7) days of the date of this letter.

I appreciate your assistance and your cooperation with this matter.

Sincerely,

Al Fogel

Al Fogel

cc: Terrance E. McGowan (via e-mail)
Ryan Oehlhof (via e-mail)
Mark Gauf (via e-mail)
Baum Sigman - Legal Counsel (via e-mail)

MG/opeiu#9/rer/P:\MADISON\Contractors-Proppant\Request for Information - Glen Garity - 4 25 12.doc

BRANCH OFFICES:

Appleton: 5191 A Abitz Road
Appleton, Wisconsin 54914
Phone: (920) 739-6378

Madison: 4702 South Biltmore Lane
Madison, Wisconsin 53718
Phone: (608) 243-0139

Eau Claire: 1003 S. Hillcrest Parkway
Altoona, Wisconsin 54720
Phone: (715) 838-0139

EXHIBIT 3(a)(1)

International Union of Operating Engineers

LOCAL ONE HUNDRED AND THIRTY-NINE

CHARTERED FOR THE STATE OF WISCONSIN

N27 W23233 ROUNDY DRIVE P.O. BOX 130 PEWAUKEE, WISCONSIN 53072

PHONE: (262) 896-0139 FAX (262) 896-0758

TERRANCE E. McGOWAN
Business Manager

April 25, 2012

Mr. Marc Rowland, CEO
Proppant Specialists, LLC
2003 Nine Road
Brady, TX 76825-7209

Re: Request for Information

Dear Mr. Rowland:

As you are aware, the National Labor Relations Board certified the results of election on April 19, 2012. This will advise you that the International Union of Operating Engineers, Local No. 139 is requesting the names, addresses, and telephone numbers of all full time and regular part equipment operators, lab techs, and mechanics employed by the Employer at its 12451 Franklin Road Tomah, Wisconsin 54660 facility; excluding all managerial employees, office clericals, guards, and supervisors as defined in the act.

Please contact me at 608-243-0139 or 4702 S. Biltmore Lane Madison, Wisconsin 53718, within seven (7) days of the date of this letter.

I appreciate your assistance and your cooperation with this matter.

Sincerely,

Al Fogel

Al Fogel

cc: Terrance E. McGowan (via e-mail)
Ryan Oehlhof (via e-mail)
Mark Gauf (via e-mail)
Baum Sigman - Legal Counsel (via e-mail)

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EXHIBIT 3(a)(2)

International Union of Operating Engineers

LOCAL ONE HUNDRED AND THIRTY-NINE

CHARTERED FOR THE STATE OF WISCONSIN

N27 W23233 ROUNDY DRIVE P.O. BOX 130 PEWAUKEE, WISCONSIN 53072

PHONE: (262) 896-0139 FAX (262) 896-0758

TERRANCE E. McGOWAN
Business Manager

May 8, 2012

Mr. Glen Garity
Proppant Specialists, LLC
12491 Franklin Road
Tomah, WI 54660

Re: Request for Information

Dear Mr. Garity:

Since our last letter dated April 25, 2012, we have received no response from you. As you are aware, the National Labor Relations Board certified the results of election on April 19, 2012. This will advise you that the International Union of Operating Engineers, Local No. 139 is requesting the names, addresses, and telephone numbers of all full time and regular part equipment operators, lab techs, and mechanics employed by the Employer at its 12491 Franklin Road Tomah, Wisconsin 54660 facility; excluding all managerial employees, office clericals, guards, and supervisors as defined in the act.

Please contact me at 608-243-0139 or 4702 S. Biltmore Lane Madison, Wisconsin 53718, within seven (7) days of the date of this letter.

I appreciate your assistance and your cooperation with this matter.

Sincerely,

Al Fogel

Al Fogel

cc: Terrance E. McGowan (via e-mail)
Ryan Oehlhof (via e-mail)
Mark Gauf (via e-mail)
Baum Sigman - Legal Counsel (via e-mail)

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BRANCH OFFICES:

Appleton: 5191 A Abitz Road
Appleton, Wisconsin 54914
Phone: (920) 739-6378

Madison: 4702 South Biltmore Lane
Madison, Wisconsin 53718
Phone: (608) 243-0139

Eau Claire: 1003 S. Hillcrest Parkway
Altoona, Wisconsin 54720
Phone: (715) 838-0139

EXHIBIT 3(b)(1)

International Union of Operating Engineers

LOCAL ONE HUNDRED AND THIRTY-NINE
CHARTERED FOR THE STATE OF WISCONSIN
N27 W23233 ROUNDY DRIVE P.O. BOX 130 PEWAUKEE, WISCONSIN 53072
PHONE: (262) 896-0139 FAX (262) 896-0758

TERRANCE E. McGOWAN
Business Manager

May 8, 2012

Mr. Marc Rowland
Proppant Specialists, LLC
2003 Nine Road
Brady, TX 76825

Re: Request for Information

Dear Mr. Rowland:

Since our last letter dated April 25, 2012, we have received no response from you. As you are aware, the National Labor Relations Board certified the results of election on April 19, 2012. This will advise you that the International Union of Operating Engineers, Local No. 139 is requesting the names, addresses, and telephone numbers of all full time and regular part equipment operators, lab techs, and mechanics employed by the Employer at its 12491 Franklin Road Tomah, Wisconsin 54660 facility; excluding all managerial employees, office clericals, guards, and supervisors as defined in the act.

Please contact me at 608-243-0139 or 4702 S. Biltmore Lane Madison, Wisconsin 53718, within seven (7) days of the date of this letter.

I appreciate your assistance and your cooperation with this matter.

Sincerely,

Al Fogel

Al Fogel

cc: Terrance E. McGowan (via e-mail)
Ryan Oehlhof (via e-mail)
Mark Gauf (via e-mail)
Baum Sigman - Legal Counsel (via e-mail)

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BRANCH OFFICES:

Appleton: 5191 A Abitz Road
Appleton, Wisconsin 54914
Phone: (920) 739-6378

Madison: 4702 South Biltmore Lane
Madison, Wisconsin 53718
Phone: (608) 243-0139

Eau Claire: 1003 S. Hillcrest Parkway
Altoona, Wisconsin 54720
Phone: (715) 838-0139

EXHIBIT 3(b)(2)

FORM NLRB-501

FORM EXEMPT UNDER 44 U.S.C. 3512

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
30-CA-082116	May 31, 2012

INSTRUCTIONS

File an original and 4 copies of this charge with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer		b. Number of workers employed
Proppant Specialists, LLC		
c. Address (street, city, state, ZIP code)	d. Employer Representative	e. Telephone No.
12451 Franklin Rd. Tomah, WI 54660	Glen Garity	608-374-4942
f. Type of Establishment (factory, mine, wholesaler, etc.)	g. Identify principal product or service	
Production	Sand and gravel	

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a)(5), of the National Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

On April 19, 2012, the National Labor Relations Board certified the International Union of Operating Engineers, Local 139, AFL-CIO as the exclusive bargaining representative of the Employer's bargaining unit consisting of all full-time and regular part-time equipment operators, lab techs, and mechanics employed by the Employer at its Tomah, Wisconisn facility (30-RC-06783). Subsequently, despite repeated demands (including on April 25, 2012, May 8, 2012 and May 22, 2012), the above named Employer has refused to bargain collectively with the 9(a) representative of its employees over the terms of an initial collective bargaining agreement.

Additionally, since at least on April 25, 2012, and continuing thereafter, the above Employer failed and refused to provide information requested by the International Union of Operating Engineers, Local 139, AFL-CIO , the exclusive representative of its employees, which is relevant and necessary in carrying out its duties and responsibilities under the NLRA.

By the above and other unlawful activities, the Employer has violated the Act.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)
International Union of Operating Engineers, Local 139, AFL-CIO

4a. Address (street and number, city, state and ZIP code)	4b. Telephone No.
4702 S. Biltmore Lane Madison, WI 53718	608/223-0139

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filed in when charge is filed by a labor organization.
International Union of Operating Engineers, AFL-CIO

RECEIVED NLRB 2012 JUN 4 AM 8:20 REGION 30 MADISON WI

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By X Pasquale A. Fioretto Title Attorney

Signature of representative or person making charge Pasquale A. Fioretto

Address	Telephone No.	Date
Baum Sigman Auerbach & Neuman, Ltd. 200 W. Adams Street, Chicago, IL 60606	312/236-4316	May 31, 2012

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

EXHIBIT E

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 30

PROPPANT SPECIALISTS, LLC

and **Case 30-CA-082116**

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL NO. 139, AFL-CIO

AFFIDAVIT OF SERVICE OF: Complaint Summary Judgement, dated June 26, 2012.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **June 26, 2012**, I served the above-entitled document(s) by **certified or regular mail,** as noted below, upon the following persons, addressed to them at the following addresses:

GLEN GARITY PROPPANT SPECIALISTS, LLC 12451 FRANKLIN RD TOMAH, WI 54660-7562	**CERTIFIED MAIL**
GREGORY H. ANDREWS , ESQ. JACKSON LEWIS LLP 150 N MICHIGAN AVE STE 2500 CHICAGO, IL 60601-7619	**REGULAR MAIL**
PASQUALE A. FIORETTO, ATTORNEY BAUM, SIGMAN, AUERBACH & NEUMAN LTD 200 WEST ADAMS STREET, SUITE 2200 CHICAGO, IL 60606	**REGULAR MAIL**
INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL NO. 139, AFL-CIO 4702 S BILTMORE LN MADISON, WI 53718-2106	**CERTIFIED MAIL**

June 26, 2012
Date

June Czarnezki, Designated Agent of NLRB
Name

Signature

EXHIBIT G

1

SENDER: *COMPLETE THIS SECTION*

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. A

GLEN GARITY
PROPPANT SPECIALISTS, LLC
12451 FRANKLIN RD
TOMAH, WI 54660-7562

CA-082116

COMPLETE THIS SECTION ON DELIVERY

A. Signature
x Kelea Rainey ☒ Agent ☐ Addressee

B. Received by *(Printed Name)* Kelea Rainey C. Date of Delivery 6-25-12

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ☐ Yes

2. Article Number *(Transfer from service label)* 7010 3090 0003 4074 3285

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

EXHIBIT G

(2)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

PROPPANT SPECIALISTS, LLC	)	
	)	
and	)	Case 30-CA-082116
	)	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, AFL-CIO	)	

ANSWER TO COMPLAINT

Pursuant to §§ 102.20 and 102.21 of the rules and regulations of the National Labor Relations Board, FTS International Proppants, LLC (incorrectly named as Proppant Specialists, LLC, hereinafter "Proppant"), by its attorneys, Jackson Lewis LLP, answers the allegations of the Complaint denying each and every allegation of said Complaint, except, and only to the extent, as is herein expressly admitted or qualified:

1. The original charge in this proceeding was filed by the Union on May 31, 2012, and a copy was served by regular mail on Respondent on the same date.

ANSWER: Proppant admits the allegations contained in Paragraph 1 of the Complaint.

2. (a) At all material times, Respondent, a limited liability corporation, with its headquarters in Brady, Texas, has been engaged in the business of manufacturing and delivering industrial sands from its Tomah, Wisconsin facility.

(b) During the past calendar year, Respondent, in conducting its operations described above in subparagraph 2(a), sold and shipped goods and materials valued in excess of $50,000 directly to customers located outside of the State of Wisconsin.

(c) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

ANSWER:

(a) Proppant admits the allegations contained in Paragraph 2(a) of the Complaint.

EXHIBIT H

(b) Proppant admits the allegations contained in Paragraph 2(b) of the Complaint.

(c) Proppant admits the allegations contained in Paragraph 2(c) of the Complaint.

3. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

ANSWER: Proppant admits the allegations contained in Paragraph 3 of the Complaint.

4. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and/or agents of Respondent within the meaning of Section 2(13) of the Act:

Name	Position at Respondent
Marc Rowland	CEO
Glen Garity	Acting Plant Manager

ANSWER: Proppant admits Marc Rowland is CEO and Glen Garity is Plant Manager.

5. (a) The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time equipment operators, lab techs, and mechanics employed by the Employer at its Tomah, Wisconsin facility, but excluding all managerial employees, office clericals, guards, and supervisors as defined in the Act.

(b) On June 9, 2011, a representation election by secret ballot was conducted among the employees in the Unit, and, on April 19, 2012, the Union was certified as the exclusive collective bargaining representative of the Unit.

(c) At all material times based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the Unit.

ANSWER:

(a) Proppant admits the allegations contained in Paragraph 5(a) of the Complaint.

(b) Proppant admits the allegations contained in Paragraph 5(b) of the Complaint.

(c) Proppant admits the Union was certified as the exclusive collective bargaining representative of the Unit on April 19, 2012; however Proppant denies the Union is the exclusive collective bargaining representative of the Unit, because the Unit was improperly certified.

6. (a) On about April 25, 2012, May 8, 2012, and May 22, 2012, the Union, , [sic] by letter, requested that Respondent recognize it as the exclusive collective bargaining representative of the Unit and bargain collectively with the Union as the exclusive collective bargaining representative of the Unit. Copies of these letters are attached as Exhibits 1(a)(1), 1(a)(2), 1(b)(1), 1(b)(2) and 1(c).

(b) Since about May 29, 2012, the Respondent, by letter, has declined to bargain with the Union and has failed and refused to recognize and bargain with the Union as the exclusive collective bargaining representative of the Unit. A copy of this letter is attached as Exhibit 2.

ANSWER:

(a) Proppant admits the allegations contained in Paragraph 6(a) of the Complaint.

(b) Proppant admits the allegations contained in Paragraph 6(b) of the Complaint.

7. (a) On about April 25, 2012, May 8, 2012, and May 22, 2012, the Union requested, by letter, that Respondent furnish the Union with the names, addresses and telephone numbers of employees in the Unit. Copies of these letters are attached as Exhibits 3(a)(1), 3(a)(2), 3(b)(1), 3(b)(2), and 3(c).

(b) The information requested by the Union, as described above in paragraph (a) is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective bargaining representative of the Unit.

(c) Since about May 29, 2012, Respondent, in writing, has failed and refused to furnish the Union with the information requested by it as described above in paragraph (a). See attached Exhibit 2.

ANSWER:

(a) Proppant admits the allegations contained in 7(a) of the Complaint.

(b) Proppant admits the information requested in Paragraph 7(a) is necessary for and relevant to a union's performance of its duties as the exclusive collective bargaining representative; however, Proppant denies the Union is the exclusive collective bargaining representative of the Unit.

(c) Proppant admits the allegations contained in Paragraph 7(c) of the Complaint.

8. By the conduct described above in paragraphs 6 and 7, and their subparagraphs, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective bargaining representative of its employees in violation of Sections 8(a)(1) and (5).

ANSWER: Proppant admits it has failed and refused to bargain collectively with the Union as described in Paragraphs 6 and 7 of the Complaint; however, Proppant denies the Union is the exclusive collective bargaining representative of its employees and therefore denies the remaining allegations contained in Paragraph 8.

9. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER: Proppant admits the allegations described in the Complaint affect commerce within the meaning of Section 2(6) and (7) of the Act. Proppant denies committing any unfair labor practices described above and further denies the allegation that the unfair labor practices described above are the "unfair labor practices of Respondent."

10. (a) Respondent's purpose in refusing to bargain is to test the certification the Board issued in Case 30-RC-006783.

(b) As part of the remedy for Respondent's unfair labor practices alleged above in paragraphs 6 and 7, and their subparagraphs, the General Counsel seeks:

(i) An Order requiring Respondent to bargain in good faith with the Union, on request, as the recognized bargaining representative in the appropriate unit;

(ii) An Order extending the certification year as required by Mar-Joe Poultry, 136 NLRB 785 (1962) and that such extension be based on the date upon which Respondent begins to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit;

(iii) All other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER:

(a) Proppant admits the allegations contained in paragraph 10(a) of the Complaint.

(b) Proppant denies the unfair labor practices alleged in paragraphs 6 and 7 and their subparagraphs of the Complaint are the "unfair labor practices of Respondent."

AFFIRMATIVE DEFENSES

1. The certification of the Union on April 19, 2011 was invalid and Proppant is not required to bargain with or furnish information to a union that has not been properly certified as the exclusive collective bargaining representative of its employees.

2. The ruling finding Barrett Oliver was not a supervisor does not comport with the law and evidence presented in the underlying proceedings and thus the Certification of the Election should be reversed.

3. The Complaint is barred, in whole or in part, because the Board lacks a quorum. Specifically, under the National Labor Relations Act ("NLRA"), all authority is vested in the Board, and while others may act on the Board's behalf by statute or delegation, the Board lacks a quorum because the President's recess appointments are constitutionally invalid. Therefore, the Board's agents or delegates lack authority to act on behalf of the Board, as a quorum does not exist in fact and in-law. Proppant reserves the right to challenge the authority of the Board and its agents or delegates if they continue to act in the absence of a lawfully constituted quorum.

WHEREFORE, Proppant requests the following relief:

1. An Order dismissing the Complaint and dismissing the Certification of the Bargaining Representative.

July 9, 2012

FTS INTERNATIONAL PROPPANTS, LLC

By: /s/ Gregory H. Andrews
One of Its Attorneys

Gregory H. Andrews
Sarah J. Gasperini
Jackson Lewis LLP
150 N. Michigan Avenue, Suite 2500
Chicago, Illinois 60601
Tel: (312) 787-4949
Fax: (312) 787-4995
gregory.andrews@jacksonlewis.com
gasperis@jacksonlewis.com

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on July 9, 2012, he caused a copy of the foregoing **RESPONDENT FTS INTERNATIONAL PROPPANTS, LLC's ANSWER TO COMPLAINT** to be electronically filed according to NLRB E-Filing System protocols, and caused a copy to be served, via U.S. mail, postage prepaid, on the following:

Pasquale Fioretto, Esq.
Attorney for IUOE, Local 139
Baum Sigman Auerbach & Neuman, Ltd.
200 West Adams Street, Suite 2200
Chicago, IL 60606

s/ Gregory H. Andrews
Gregory H. Andrews

Proppant Specialists, LLC
Case 30-CA-082116

Copies of Acting General Counsel's Motion for Summary Judgment have been sent on July 11, 2012 by certified and regular mail, to the following parties of record:

EXECUTIVE SECRETARY, LESTER HELTZER NATIONAL LABOR RELATIONS BOARD 1099 14TH STREET NW WASHINGTON, DC 20570	REGULAR MAIL
GLEN GARITY PROPPANT SPECIALISTS, LLC 12451 FRANKLIN RD TOMAH, WI 54660-7562	REGULAR MAIL
GREGORY H. ANDREWS, ESQ. JACKSON LEWIS LLP 150 N MICHIGAN AVE STE 2500 CHICAGO, IL 60601-7619	CERTIFIED MAIL
PASQUALE A. FIORETTO, ATTORNEY BAUM, SIGMAN, AUERBACH & NEUMAN LTD 200 WEST ADAMS STREET, SUITE 2200 CHICAGO, IL 60606	CERTIFIED MAIL
IUOE LOCAL NO. 139, AFL-CIO 4702 S BILTMORE LN MADISON, WI 53718-2106	REGULAR MAIL